93-1092

Supreme Court, U.S.
FILED
JAN 5 1994
OFFICE OF THE CLERK

No._____

In The
SUPREME COURT OF THE UNITED STATES
October term, 1993

E.Don Smith pro se, Eileen Smith pro se
Petitioners

v.

Zoning Board of Appeals of the
Town of Greenwich
of the State of Connecticut et al.
Respondents

Petition for a Writ of
Certiorari to the
United States Supreme Court

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered in this proceeding on August 10, 1993. (14632) (14633)

E. Don Smith & Eileen Smith
pro ses, Petitioners
35 Strickland Rd. Cos Cob,
Connecticut, 06807
(203) 661-2883

January 5, 1994

QUESTIONS PRESENTED

1. Whether there has beem a violation of the Due Process clause when a subdivision of land that meets all written regulations is denied for the vague standards of "public health and safety" just because it is located withir a residential Historic District?

2. Whether there has been a violation of civil rights and equal protection under the law when the written state statutes and local subdivision regulations are applied differently
a) within the same zone and
b) between identical R-7 zones?

3. Whether there has been a taking without just compensation when a free throw(1) building lot has been confiscated for public open space and the ZBA chairmam acknowleges that no alternative would be acceptable to them?

---

(1) **Proof of this "free throw"** Ability was confirmed by the Director of Planning and Zoning within the Preliminary Approval of this Subdivision Application 1017-C dated April 21, 1987. (See Appendix 96A)

LIST OF ALL PARTIES TO THE PROCEEDING

The parties in the proceeding before the Supreme Court are as follows:

Plaintiffs-Appellants-Petitioners

1. E.Don Smith, Eileen Smith pro ses

Defendants-Appellees-Respondents

1. Planning and Zoning Board of Appeals of the Town of Greenwich, Connecticut

2. Greenwich Historical Society of the ~~Town of Greenwich, Connecticut~~ Additional Defendant-Appellee

3. Anita De Lessups Keefe Additional Defendant-Appellee

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

LIST OF ALL PARTIES TO THE PROCEEDING.....ii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE POLICIES INVOLVED.....3

STATEMENT OF THE CASE.....4

FEDERAL QUESTIONS RAISED IN LOWER COURTS.....9

REASONS FOR GRANTING THE WRIT:.....11

REASON I.....12

This case represents a **conflict between the Connecticut Appellate Court and the Connecticut Supreme Court** on an important question of the **interpretation of standards** to be used regarding **property rights** and **historic preservation** which would be applicable throughout the United States of America.

REASON II.....14

This case represents a ruling that **departs from the accepted and usual course** of proceedings. The Connecticut Supreme Court could not find any state statute or local ordinance which prohibited subdivision within an Historic District. So they used the **vague extrapolation** of "public health and safety" as a standard.

REASON III.....22

Furthermore, within this case, a state court has ruled **inappropriately** on the **Constitutional** issue of **Due Process, equal protection** under the law, and **taking** without just compensation.

This issue should be settled by the U.S. Supreme Court: **Can the property owners within an Historic District be treated differently from one another and from other comparable zones, without 1) written statutes and ordinances that specifically obstruct sub divisions and 2) without prior notice?**

CONCLUSIONS.....38

APPENDIX..(within first volume).....1a

APPENDIX..(Second Volume).....32a

TABLE OF AUTHORITIES

CASES:

Allied Plywood Inc. v P & Z of Windsor 2 Conn App. 506.....19

American Power & Light Co. v Securities & Exchange Comm. 329 US 90.....19

Annicelli v S. Kingston (1983) 463 A.2d 133, 140-141..... 27

Armstrong v U.S. (1960) 364 US 40....25

Beach v Town of Milford 141 Conn.79..19

Coleman v Darden (1979) 444 U.S.927..23

Entertainment Concepts Inc. III v Maciejewski (1980) 450 US 919.....21

First National Bank of Fayetteville v Smith 421 US 1371.....28

Gil v Inland Wetlands et al 23 Conn. App 379.....24

Hartford Steam Boiler Inspections and Insurance v Harrison (1937) 301 US 459.....16

Interest of Broods (1980) 618 P.2d 814.....17

Jordan v DeGeorge (1951) 341 US 223..21

Kotch v Board of River Port Pilot Comrs. (1947) 330 US 552.....18

Lucas v S. Carolina Coastal Council (1992) 112 S.Ct. 2886.....18

Maxwell v Bugbee (1919) 250 US 525.. 27

Mercedes Dredging Co v Mercedes County 67 F.Supp 592.....25

Missouri P.R. Co.v Mackey (1988) 127 U.S. 205.....23

Mobile, J. & K.C.R.Co.v Turnipseed (1910) 219 us 35.....16

National Union of M.C.& S. v Arnold (1954) 348 US 37.....23
Nebbis v N.Y. (1934) 291 U.S. 502..16
Nollan v Cal. Coastal Comm. 483 US 825.....25
Re G (1981) 637 P.2d 66..... 20
Reed v Reed (1971) 404 US 71..... 17
Richardson v Belcher (1971) 404 US 78..... 13
Rinaldi v Yeager (1966) 384 US 305..... 26
R.K. Development v Norwalk 156 Conn 369..... 19
Robt. Reed v P & Z of Chester 208 Conn 431..... 19
Sonn. v Planning Comm City of Bristol 172 Conn 156..... 18
Soon Hing v Crowley (1885) 113 US 703.....23
T.L.C.Developoment Inc. v P & Z Comm (1990) 577 A.2d 288.....13
468 US 195-196.....21

FEDERAL STATUTES:

U.S. Constitution 5th and 14th Amendments 14,26

Civil Rights Act of 1871 (42 USCS Sec 1983) 24

STATE CONSTITUTION:

State of Connecticut Constitution Article 1, Sec. 8 & 11.....2

CONN. GENERAL STATUTES

Sec. 8-25 (Sub division)
Sec. 8-26 " "
Sec. 22a-1 et seq. (EPA)
Sec. 7-147
Sec. 7-148

Greenwich Town Ordinance

Sec 101(d)
Special Act 469

BOOKS

Kauper, Paul & Beytagh, Franc:
Constitutional Law, Boston:
Little, Brown and Co. 1980....19,26
Witt, Elder: The Supreme Court from
A to Z, Washington, D.C.:
Congressional Quarterly Inc.
1993.....27

Town of Greenwich Property Records,
Book No. 1436, page 27.....20

In The
SUPREME COURT OF THE UNITED STATES
October term, 1993

No._ _ _ _ _ _ _

E.Don Smith pro se, Eileen Smith pro se
Petitioners

v.

Zoning Board of Appeals of the
Town of Greenwich
of the State of Connecticut et al.
Respondents

Petition for a Writ of
Certiorari to the
United States Supreme Court

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered in this proceeding on August 10, 1993. (14632) (14633)

OPINIONS BELOW

The opinion of the **Connecticut Supreme Court** is reported in E.DON SMITH ET.AL, v. ZONING BOARD OF APPAEALS OF THE TOWN OF GREENWICH ET AL. (14632 & 14633) 227 Conn. 71 and a copy of the opinion appears in the Appendix p. 1a.

Also a copy of the **AMICUS CURIAE BRIEF** OF PLANNING AND ZONING LAW SECTION OF THE **CONNECTICUT BAR ASSOCIATION** appears in the Appendix p.32a

The opinion of the **Connecticut Appellate Court** is reported in E.DON SMITH ET AL. v ZONING BOARD OF

APPEALS OF THE TOWN OF GREENWICH (10431) 29 Conn. App.28. Appendix p.53a.

The opinion of the **Connecticut Superior Court** is presented in a Memorandum of Decision: E.DON SMITH AND EILEEN SMITH v ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH D.N. CV89 0101333 S April 10, 1991 Appendix p.68a.

Zoning Board of Appeals Town of Greenwich (Appeal No. 7400-continuation) denial of the subdivision application 1066 of E.Don and Eileen Smith for 35 Strickland Road, Cos Cob. Connecticut was dated May 15 1989. Appendix p.90a.

Planning and Zoning Town of Greenwich **denial** of Subdivision Application No. 1066 of E.Don and Eileen Smith was dated December 8, 1988 Appendix p.94a.

Planning and Zoning of the Town of Greenwich **Preliminary Approval** of Subdivision Application 1017-C E.Don and Eileen Smith was dated April 21, 1987. Appendix P.96a

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on August 10, 1993. The petitioners requested an extension of time to submit a writ of certiorari on October 27, 1993.

The extension of time was granted on November 18, 1993 by Justice Thomas, making the due date January 7, 1994.

This petition for certiorari was filed within the sixty day extension.

The Court's jurisdiction is invoked under **28 U.S.C.S 1257.**

CONSTITUTIONAL PROVISIONS, STATUTES, AND ADMINISTRATIVE POLICIES INVOLVED:

42 U.S.C.S. 1983
Every person who, under color of any statute, ordinance, regulation, custom, or usage of an State or Territory of the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

U.S. Const. Amend XIV:
Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. Const. Amend. V:
...nor be deprived of life,liberty, or property without due process of law;
...nor shall private property be taken for public use, without just compensation.

Conn. Constitution Article 1,
Sec. 8: "No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law."
Sec. 11: "The property of no person shall be taken for public use without

just compensation therefor."
Sec. 1, 12. Amemdment 17.

Town of Greenwich Town Charter
Sec. 101 (d) provides that "the regulations shall provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to **health or the public safety,** that proper rovision shall be made for water, drainage and sewerage..."

STATEMENT OF THE CASE

1. The Plaintiffs, E.Don Smith and Eileen Smith reside at and are owners of 35 Strickland Road, of the Mill Pond Historic District of Greenwich Conn.

2. On or about January 15, 1987, the Plaintiffs submitted a subdivision application to the Planning and Zoning Commission of the Town of Greenwich to subdivide the premises into three legal lots. The Plaintiff's property contained 33,032 sq.ft. zoned, R-7, single family lots of 7,500 sq.ft. This proposal, through its design left 14.67 % of land as open space.

3. On April 21, 1987, The Commission conducted a hearing on the Plaintiffs' Subdivision application and granted Preliminary Approval, subject to 14 Specific conditions (6 relating to a house) and directed them to prepare a Final Sub-Division Plan.

Within the Preliminary Approval, it was confirmed that, relative to the front building lot (lot 1): "...the **gross area includes a free-throw lot".**

During this period of approximately 6 months, there was never any discussion

regarding: environmental issues, public health and safety concerns, or any objection to constructing a house on the front building lot.

4. On November 22, 1988, the Plaintiff's Final Subdivision plan was denied by the P&Z Board.

(a) The Commission based its denial on the conclusion that the subdivision plan would permit construction of a house adjacent to Strickland Road, "THEREBY DISRUPTING AN ESSENTIAL CHARACTERISTIC OF THE HISTORIC DISTRICT."

(b) The Commission further stated the Sub-division did not conform to the "Town Plan of Development" in that it did not preserve Historic Resources. (**Yet within the Greenwich Municipal code Section 98 it states that a Sub division application cannot be denied because of reasons relating to the Town Plan**).

5. The Plaintiffs thereafter appealed the decision of the commission to the Defendant, Planning and Zoning Board of Appeals (ZBA) of the Town of Greenwich. On April 19 and May 3, 1989, Pursuant to Section 103 of the Greenwich Municipal Code, The Zoning Board conducted DE NOVO Public Hearings on the Plaintiff's Final Subdivision Plan and denied the appeal. The reasons were:

(a) Property is located in the Historic District thus bringing into play Article 5 of the Greenwich Municipal Code (Description of properties within the Historic District).

(b) The Sub-division did not meet the Sub-division regulations "Section 6-260" because it did not conform to the Town Plan of

Development's objective of preserving historic resources, ie, the streetscape.

(c) The plan would have an adverse impact on coastal resources.

6. On October 22, 1990, in the Connecticut Superior Court in Stamford, The Plaintiff's appealed the decision of the Greenwich ZBA. On April 9, 1991, The Trial Court issued a Memorandum of Decision stating that the Plaintiffs' position is without merit regarding sub-division denial because:

(a) The board did apply Standards contained in the Sub-Division Regulations.

(b) Historic Streetscape would be changed by sub-dividing the property into three lots and building on Lot #1.

(c) The ZBA'S decision, based on "Historic Considerations" was proper.

(d) The Plaintiffs' had notice that historic factors would be considered. It is interesting to observe that in 1987-88, while the Plaintiffs were struggling with all these agencies for a small lot and small house, approximately 100 ft from the Plaintiffs property **the Historic Society was completing their new building.** The Defendants are always arguing that you cannot see it from the street but pictures showing that it is visible were included within the Record.

7. On May 1, 1992, plaintiffs appealed to the Appellate Court. On September 8, 1992, the Appellate Court reversed the judgment of the trial court, concluding that the Board did not have the authority to consider historical factors in deciding whether to grant or deny a subdivision application because:

(a) the enabling statutes on

subdivisions did not give the board the authority to include historical factors in its regulations;

(b) the terms 'town plan of development', 'historic factors', and 'historic streetscape' are not known and fixed standards required for subdivision regulations;

(c) the Greenwich town charter forbids the board from denying a subdivision application based on the plan of development; and

(d) it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district".

8. On April 28, 1993, the town of Greenwich and the historical society appealed to the Conn. Supreme court.

9. On May 10, 1993, the **Conn. Supreme Court** formally requested that the **Connecticut Bar Association** file an **Amicus Curiae Brief** to advise them on the issues of land use, planning and zoning authority, and historic preservation. On June 9, 1993, the **Connecticut Bar Association** submitted the requested **Amicus Curiae brief** which **completely supported the Appellate Court decision** in all aspects:

"A PLANNING AND ZONING COMMISSION MAY NOT DENY A SUBDIVISION APPLICATION ON THE BASIS THAT THE PROPERTY IS LOCATED IN AN HISTORIC DISTRICT AND THAT THE DEVELOPMENT OF THE PROPERTY MAY BE INCONSISTENT WITH THE HISTORIC PRESERVATION OF THE DISTRICT.

(a) The Powers Of An Administrative Land Use Agency Are Strictly Proscribed By The Parameters Of Its Enabling Legislation Be It By

Special Act Or Pursuant To Connecticut General Statutes.

(b) Assuming, Arguendo, That Defendant Was Authorized By Its Charter To Promulgate Regulations Allowing Denial Of A Subdivision For Its Impact On Historic Preservation Goals, Defendant's Regulations Did Not Contain Known And Fixed Historical Review Standards To Guide It

(c) Defendant's Reliance On The Plan Of Development As A Source Of Authority To Consider Historical Factors Is Misplaced.

(d) The Regulations Use The Words Historic Or Historical In Only Two Provisions And These Provisions Are Not Relevant To This Application.

10. On August 10, 1993, the Connecticut Supreme Court reversed the appellate court decision stating:

(a) the charter provision giving the commission the power to protect "public health and safety" includes the power to protec the environment, which in turn includes historic preservation.

(b) the commission being authorized to consider historical factors under the subdivision regulation that permits the commission in its discretion to require an environmental assessment.

(c) the regulations here sufficiently apprised the plaintiffs of the factors that would be considered in evaluating their application.

(d) CGS 7-147 authorizes a historic district commission to cooperate with other regulatory agencies inerested in preservation, and the statutes do not confer exclusive powers on a historic district commission.

(e) the record did not indicate any conflict between the pertinent subdivision regulations and the applicable zoning regulations.

(f) the plaintiffs failed to sustain their burden of proving that there were no other viable options for the property.

FEDERAL QUESTIONS RAISED

Petitioners raised the Constitutional issues of Due process, property rights, equal protection under the law, civil rights and taking without just compensation at ZBA and at all three levels of state judicial review.

ZONING BOARD OF APPEALS:
Petitioners claimed a taking (Superior Court Memo of decision, 4/10/91, p.11)
Response by ZBA: The Board rejected this claim arguing alternatives.
SUPERIOR COURT: #CV-89-0101333-S
Petitioners' Brief: Issues (p.1)
"18-C Can planning and Zoning Commission ignore the Constitutional Rights and take a citizen's property without due process of law? Arguments under 18-C
Taking of property (p.11)
Civil Rights Act (p.12)
Constitutional Amendments: 5, 14 (p.15).
Response by Superior Court dated 4/10/91
"The Board rejected this claim (taking) concluding that because other alternatives for development of the property exist, the plaintiffs were not deprived of their development rights. (p.11) There was no response regarding discrimination charge even though another structure was built concurrently to this application.
APPELLATE COURT: No. A.C.10431
Petitioners' Brief dated 10/9/91

Issues (p.ii)
III. "Did the trial Court fail to recognize that this subdivision denial was a violation of Constitional Rights:
A. It was a taking without due process and just compensation.
B. It was a deprivation of Civil Rights with prejudice.
Summary of Argument III (p.5)
Detailed Arguments of III above:
Taking/due process (p.20-24)
Civil rights (p.26)
Response by the Appellate Court:
The Court reversed the trial court's decision and upheld the petitioners' rights.
SUPREME COURT 14632, 14633 8/10/93
Petitioners'Brief:
Statement of Aggrievement (p.1)
"The Appellees are aggrieved in that their property was taken without due process of the law and in violation of the 5th and 14th Amendments of the US Constitution, and in violation of Article 1, sections 1,8, 11, 12, and amendment 17 of the Constitution of the State of Connecticut."
Summary of the Argument
I. F. The Uniformity Clause of CGS 8-2 and the Civil Rights Act of 1871 prevents discriminatory treatment of owners... "(p.4)
II. F. A taking without just compensation will occur if the Appellate Court decision is overturned because a 100% confiscation of a free cut property has occurred." (p.4)
Arguments: Due Process (p.9) Civil rights (p.11-13) Taking (p.24-29)
Response by Ct. Supreme Court: 8/10/93
"The plaintiffs could not prevail on their claim that the decision of the Appellate Court could be upheld on the

ground that the denial of their subdivision application constituted an unconstitutional taking of their property without just compensation, they having failed to sustain their burden of proving that there were no other viable options for the property." (p.4) The Conn. Supreme Court failed to analyze the charge of discrimination and violation of Civil Rights, despite the fact that the neighbor Historic Society was allowed to build concurrently with the Petitioners denial.

REASONS WHY THIS CASE SHOULD BE HEARD

INTRODUCTION

The issue in this case has an impact on all of America. Historic preservation is a worthwhile goal but the use of arbitrary discrimination will not promote the growth of Historic areas, rather, it will cause a decline.

In Connecticut alone, there are 6,200 families who have already agreed to allow their property to be part of the 99 Historic Districts. They are under the conception that the only restriction upon them is the compliance with the "Certificate of Appropriateness procedure," ie, all changes must be of a congruent design.

If this decision is allowed to stand, then all property owners within Historic Districts across America will be subjected to unlimited police power because the authority of Planning and Zoning Boards and Historic District Commissions will be omnipotent and unpredictable.

The result will be the end of preservation as we know it because no citizen would be willing to forfeit their right to property, due process, and equal protection under the law.

Even greater effect may be felt nationwide. If a state's highest court is allowed to utilize such a broad standard as the "protection of public health and safety", **law will be diluted.** If written rules are not applied and adhered to, and if commissions can exceed their authority, there will be chaos in land development.

There are three major reasons why the Supreme Court should hear this case.

REASON I:

This case represents a **conflict between the Connecticut Appellate Court and the Connecticut Supreme Court** on an important question of the **interpretation of standards** to be used regarding **property rights** and **historic preservation** which would be applicable throughout the United States of America.

The Appellate Court unanimously upheld the petitioners' right to subdivide, stating that the Zoning Board of Appeals had no authority to consider historic factors because "historic" is outside the enabling statute.

Even the defendants' attorney admitted, during oral argument, that if the subject property was not located in an historic district, but in another R-7 zone, the application would have been approved. This acknowledged fact by the opposition confirms that there was a lack of due process. "...statutory discrimination between two like classes

cannot be rationalized by assigning different labels to them..." Richardson v Belcher (1971) 404 US 78.

The case was appealed to the State Supreme Court, who requested that the **Connecticut Bar Association** (CBA) submit an **Amicus Curae brief** to clarify the issue. The three CBA attorneys involved unanimously supported the Appellate Court and the petitioners: "**The powers of an administrative land use agency are strictly proscribed by the parameters of its enabling legislation be it by special act or pursuant to Connecticut General Statutes**" (page 1) (Appendix p.

Despite the above objective and concrete input, the Supreme Court unanimously overturned the Appellate Court decision stating: "ZBA has the right to consider historic factors in deciding subdivisions because their Town Charter allows them to protect public health and safety, which includes protecting the environment, which in turn includes historic preservation." Connecticut Law Journal 8/10/93, page 4.

This is a contradiction of past Conn. Supreme Court decisions. "Public health and safety" has been discredited in 1990. "Policy statements gleaned from subdivision regulations regarding compliance with public health and safety regulations **do not provide a sufficient basis for rejection** of a subdivision permit. " TLC Development, Inc. v P & Z Comm. (1990) 577 A.2d 288, as quoted by the Appellate Court Memorandum of Decision page 38.

In regard to the effect of this proposal on the environment, the trial court decided that "it **would not** have an adverse impact on coastal resources because of the alteration of natural

features of vistas." (Superior Ct.p.20.)

The environmental protection act (sec.22a-1a) does not control subdivisions, (CBA Amicus Curiae Brief page 6), therefore, it is impractical for any ZBA to enforce such an application of an unrelated statute.

For the Ct. Supreme Court to say that the construction of a house in a residential neighborhood would be detrimental to health and safety is a clearly erroneous deduction---especially since new construction occurred within 100 feet. This decision is in violation of: 1) state constitution and statutary rules; and 2) petitioners' statutory and constitutional rights.

IMPACT of Not Reversing the Opinion:

To allow this decision to stand, is to surrender **principled decision-making** by courts and by administrative agencies. Instead of examining the state enabling acts and the local regulations, and basing their interpretation on the **standards of legal doctrine**, they will be making decisions by arbitrary preference.

Planning and zoning boards will become **independently omnipotent**, and citizens will lose all their property rights despite the 5th and 14th Amendments.

REASON II.

This case represents a ruling that **departs from the accepted and usual course** of proceedings. The Conn.Supreme Court could not find any state statute or local ordinance which prohibited subdivision within an Historic District. So the following **vague extrapolation** of a standard was made: "Accordingly, we conclude that because the phrase '**public**

health and safety' includes **environmental** factors, it includes **historical** factors."

ARGUMENT A: Loose linkage of interpretation. (No standards)
The Supreme Court's statement contains three unrelated assumptions. One, that the expression public health and safety always includes environmental factors and two, that environmental factors automatically includes historical factors. The third assumption is that a legal subdivision will endanger public health and safety.

The following argument is quoted from the Conn. Bar Association Amicus Curiae Brief, p.5 (See Appendix 32a) According to Websters Collegiate Dictionary, "**Health**" describes the condition of being sound in body, mind or spirit, especially to be free from physical disease and pain. It does not connote historical concerns. "**Safety**" is the condition of being safe from undergoing or causing hurt, injury or loss. Both of these words relate to whether the subdivision property is physically "**buildable**" and not to whether it will impact more esoteric and subjective sensibilities dealing with aesthetic or historic concerns outside of the subdivision. Nothing in the Town Charter ever mentions or implies in any way that historical concerns are meant to be considered in determining whether building on a particular piece of land is **dangerous. The enabling language necessary for the Commission to create regulations allowing it to decide subdivisions on their historical impact is simply not to be found within the Town Charter."**

Public health and safety have

nothing to do with historical preservation. To use this irrational association is an obstruction of due process. "Guarantee of due process demands only that law shall not be unreasonable, arbitrary or capricious, and that means selected shall have **real and substantial relation** to object sought to be obtained." Nebbis v NY (1934) 291 US 502.

"Discriminations are not to be supported by mere fanciful conjecture, and cannot stand as reasonable if they offend plain standards of common sense. Hartford Steam Boiler Inspections & Ins. v. Harrison (1937) 301 US 459.

An example of fanciful conjecture is seen in this quote from the Conn. Supreme Court: "These statutes **illuminate** the statutory phrase before us in this case because they address **generally related subjects** that the legislature **may** have **presumed** to have **considered**..." CT. Law Journal 8/10/93 page 16. (emphasis added). Such a conjecture is clearly erroneous and goes beyond what is a reasonable deduction.

ARGUMENT B: This ruling is not clearly established.

The U.S. Supreme Court has clarified Statutory legislation: "...it is only essential, so that it may not constitute denial of due process of law or of equal protection of law and that there shall be some **rational connection** between fact proved and ultimate fact presumed and that **inference** of one fact from proof on another shall not be so **unreasonable** as to be a purely **arbitrary** mandate..." Mobile, J. & K.C.R. Co. v Turnipseed (1910) 219 US 35. (emphasis added) To infer that any house would

endanger public health and safety is a wholly arbitrary conclusion, especially since new construction was allowed simultaneously.

The ruling under review, implies that ANY subdivision within an historic district would be prohibited even before the house location and design were even planned. Yet CGS 7-147 (a-k) allows for a certificate of appropriateness procedure to review structural design, proving that building will be allowed if congruent. To deny a legal subdivision on the grounds of public health and safety not only violates the statutory authority of CGS 7-147, but also violates Petitioners' statutory property rights to use their land just like their neighbors.

"Statute will not be declared void for **vagueness** and uncertainty where it employs words commonly used, previously **judicially defined,** or have settled meaning in law." Interest of Broods, (1980) 618 P2d 814. There are no standards defining "public health and safety" regarding Historic factors.

ARGUMENT C: Rules that DO NOT effect subdivisions should not be used for denial.

"...equal protection clause **denies** to states power to legislate that different treatment be accorded to persons placed by statute into different classes on basis of **criteria wholly unrelated to objective** of that statute." Reed v Reed (1971) 404 US 71. Public health and safety is not a standardized, measureable component of the subdivision regulations.

"Selective application of regulation to particular class **denies**

equal protection of laws if it rests on grounds **wholly irrelevant** to achievement of regulation's objectives." Kotch v Board of River Port Pilot Comrs. (1947) 330 US 552.

Lucas v S. Carolina Coastal Council (1992) 112 SCt.2886: "Denied the Court the ability to apply '**harmful or noxious uses' principle** to deny a land owner the ability to build. Similarly, this Court should deny the defendents the ability to use '**danger to public health and safety**' as a reason to prevent petitioners from subdividing.

How can the construction of a house on property that meets the sub-division rules within a zoned residential neighborhood be construed as detrimental to the public health and safety? Furthermore, how could it damage the environment if it met all the building codes? What does health, safety and the environment have to do with Historic factors?

ARGUMENT D: This new rule conflicts with previous decisions and rules made by the same Court.

Using "public health and safety" to deny a **legal** subdivision is a totally **arbitrary** application of vague, questionable bridges. It is in direct contradiction to previous Conn. Supreme Court decisions which held that:

1. Standards must be specific: "Subdivision regulations, in order to be legally valid, must: a) set forth 'known and fixed standards' and, b) conform to the principle that a regulation...cannot be too general in its terms." Sonn v Bristol Planning Comm. 172 Conn. 156.

The US Supreme Court concurred:

"The test of a permissible subdivision regulation is whether the criteria contained in the regulation are as reasonably precise as subject matter requires and are reasonably adequate and sufficient to guide city planning commission and to enable those affected to know their rights and obligations.: American Power & Light Co. v. Securities & Exchange Comm. 329 US 90.

2. Subdivisions which comply with ordinances must be granted:

The Conn. Supreme Court has repeatedly upheld that ZBA has no option but to approve a subdivision that meets the written regulations.

Allied Plywood Inc. v P & Z S. Windsor 2 Conn App. 506

Beach v. Town of Milford 141 Conn. 79

Robt. Reed v P & Z Comm. Town of Chester 208 Conn. 431

R.K.Developm't Co v Norwalk 156 Conn 369

The current case is an example of a Type II Due Process case because "...the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice, (and) the protection of the individual..." Kauper, Paul G.,and Beytagh, Franc, Constitutional Law, Little Brown & Co: Boston 1980, p. 704.

Both the Appellate Court and the CBA Amicus Curiae Brief strongly proclaimed that written regulations and ordinances must be adhered to.

ARGUMENT E: How would we have known that subdivision within an Historic District is prohibited even though the regulations have been met?

"Due process inexorably commands **notice** which **reasonably** informs person

that his legally protected interest may be adversely affected" Re G (1981) 637 P2d 66.

Petitioners lived in their same neighborhood, on the same block, when this particular Historic District was being formed. At the organizational meeting, the Historic District Commission (HDC) NEVER said that subdivision and building was not possible, only that new structures and changes must be compatible.

The Petitioners studied the power and authority of the Historic District Commission (HDC) in Connecticut. It is clear from CGS 7-147 (a-k) that the HDC has no authority over LAND USE. They only have the Certificate of Appropriateness mechanism to insure congruent house design.

Petitioners' property deed was mentioned by the Conn. Supreme Court as having given adequate notice. However, the the deed only says: **"Regulations imposed by reason of the fact that the premises are part of an historic district..."** It is clear that the Petitioners' property deed does not prohibit subdivision and building within this Historic District.

P & Z staff worked closely with the Petitioners in the development of this subdivision. They would not have done so if they had known that subdivision in the historic district was not possible. P & Z Board was also unaware because they granted preliminary approval and anticipated construction of a house. This proves that there was no notice.

The US Supreme Court clarified that the definition of "unconstitutionally vague" ordinance was determined "not only because it contains no definition

of the term (involved) but also because it lacks any ascertainable standard for compliance so that ... owner does not know ...(what is required)" Entertainment Concepts, Inc., III v Maciejewski (1980) 450 US 919

"...statute is unconstitutionally vague under due process clause, where its language does not convey sufficiently definite warning as to proscribed conduct when measured by common understanding and practices, or stated otherwise, where its language is such that men of common intelligence must necessarily guess at its meaning..." Jordan v De George (1951) 341 US 223.

The phrase "public health and safety" **has no standards regarding historic factors** by which it could be used within subdivision regulations for those affected and for those commissions who must make decisions.

IMPACT: If this decision is allowed to stand, it will create chaos in land development because of its' vagueness. The law will be diluted and there will be a proliferation of court cases. There will be an increased effort on the part of the courts to decide these kinds of cases because the standards used to judge them will be unpredictable and unmeasurable. The value of certainty will be lost, and so will the creation of future Historic Districts.

The US Supreme Court has ruled similarly on vagueness of standards: they "...refused to open the door to such a liberalized rule...explained that "once the door is opened to such (inquiries), it is difficult to limit their scope in any principled manner..." 468 US 195-196

REASON III

The Court has ruled **inappropriately** on the **Constitutional** issue of **Due Process, equal protection** under the law, and **taking** without just compensation and the U.S. Supreme court should decide this issue: **Can the property owners within an Historic District be treated differently from one another and from other comparable zones, without 1) written statutes and ordinances that specifically obstruct sub divisions and 2) without prior notice?**

DUE PROCESS

Due Process requires that a fair hearing has taken place. Yet:

1. Defendant's attorney testified to the Appellate Court that this Subdivision met all the requirements and would have been approved if it had been in any other comparable zone.

2. The Conn. Supreme Court acknowledged that this subdivision met the legal requirements when it phrased the issue for review: "In acting on a subdivision proposal that **conforms to applicable zoning regulations,** may a P & Z take into account the fact that the property is located in an Historic District and that the development of the property may be inconsistent with historic preservation of the district?"

3. The Appellate Court and the Conn Bar Asso have demonstrated that neither ZBA nor the HDC have any state statutes nor any local ordinances which allow the consideration of Historic factors to prohibit subdivision and building within an Historic district.

4. Simultaneously, other new construction was allowed to take place

within the very same Historic District. This is evidence of invidious discrimination under the law.

"Due process is secured if laws operate on all alike, and do not subject individuals to arbitrary exercise of powers of government." Missouri P.R. Co. v. Mackey (1988) 127 US 205

How could the defendants presume that the petitioners' subdivision would adversely impact public health and safety yet the neighbors building did not? "Statutes creating permanent irrebuttable presumptions, which are neither necessarily nor universally true, are disfavored under both Fifth and Fourteenth Amendments, because they preclude individualized determination of facts upon which substantial rights or obligations may depend. " Coleman v Darden (1979) 444 US 927.

It appears prima facie that there was discrimination against the petitioners, when neighbors (The Historical Society) were allowed to construct a new building in 1987. "Party who complains of violation of equal protection clause must show that **anyone comparably situated has been treated differently.**: National Union of M.C. & S. v Arnold (1954) 348 US 37.

"Discriminations which are open to objections are those where persons ...are **held entitled to different privileges under same conditions;** it is only then that discrimination can be said to impair that equal right which all can claim in enforcement of law." Soon Hing v Crowley (1885) 113 US 703. Citizens both within our historic district and within other comparable R-7 zones are entitled to subdivide, while petitioners are denied equal protection

of property rights under the law. This is inviolation of 42 USCS Sec 1983 Civil Rights Act of 1871.)

TAKING

The petitioners are entitled to a "free throw" in their property because the land was last divided in 1911. They bought the property because it had two extra building lots in compliance with all the known planning and zoning codes. In Gil v. Inland Wetlands et al, 23 Conn. App.379, the Court evaluated the takings issue and stated: "The plaintiff purchased the land as a building lot, and it was that value that was destroyed..."

Proof of this free throw ability is documented in the original Planning and Zoning Preliminary Approval dated April 21, 1987, issue no. 2: "...a gross area which **includes a free-throw lot...**" The above is quoted in the Conn. Supreme Court Decision: 227 Conn. 71, p.74, footnote 2.

The Petitioners can legally take this free throw in the front of their property at any time by presenting their deed and the property map to the Town legal department. Therefore, the front lawn, (known as Lot I) which is more than 53 % of the total property, must be considered as a **separate entity**. To deny building on it is to deny the petitioners of **100%** of **any** economically viable use of this building lot and of any worthwhile rights or benefits.

COMMENTS ON ALTERNATIVES

The state courts continually state that the petitioners have alternatives. Yet, within the ZBA hearing, the chairman stated that the only alternative, (condominiums on the rear of the property, which would require a

zoning code change, many variances, and special exceptions,) would never receive approval.ZBA transcript pt.I.p58.

First and foremost, why should the Petitioners be forced to consider alternatives (which are unacceptable to them as well as to their neighbors), when their subdivision is legally in complete compliance of the laws and is the only option within the zoning code?

Obviously, the defendant Town wishes to use the Petitioners front lot as a public open space. In the US Supreme Court case of Mercedes Dredging Co. v. Mercedes County 67 F Supp 598, it was stated that "where public desires to preserve scenic or historical features of privately owned land, the power of eminent domain is available, and constitutional requirement of just compensation secures private interests of owner."

The US Supreme Court also ruled that "...the Fifth Amendment requires the state to pay for any such easement (to the beach) even if the requirement of a public easement is justified...because the public interest would be served..." Nollan v California Coastal Comm'n 483 US 825.

In Armstrong v U.S.,(1960) 364 US 40, the US Supreme Court stated that "the Fifth Amendment just compensation clause...was designed to bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."

The Petitioners state a claim upon which relief can be granted. If the Town of Greenwich wants over half of the Petitioners' total property and **100%** of the front building lot for historic

preservation, it is constitutionally required to justly compensate the owners. "A taking requires sovereign to pay for what is actually gains." USCA Constitutional Amendments 5, 14.

SUMMARY OF DUE PROCESS, TAKING AND CIVIL RIGHTS

"There is denial of due process where inherently vague statutory language permits selective law enforcement." Smith v Goguen (1974) 415 US 566.

When a case is evaluated for violation of due process, the court must ask "was the decision a mere excuse for unjust discrimination or an exercize of a reasonable discretion?" Kauper, Paul & Beytagh, Franc, Constitutional Law. Little Brown & Co.Boston,1980.page 704.

What is reasonable or rational about saying that a subdivision that meets the written rules in a neighborhood of similar homes will damage public health or safety or the environment? "Equal protection clause requires more of state law than **nondiscriminatory** application within class it establishes; it also imposes requirement of **some rationality** in nature of class singled out." Rinaldi v Yeager (1966) 384 US 305.

Petitioners have been denied their property rights based on the 5th and 14th Amendments of the US Constitution and on sections 8 and 11 of Article one of the Connecticut Constitution. While presevation is a worthwhile objective, it is not fair to penalize Historic District residents by changing rules after they have voted their property into the Historic District.

Petitioners have been denied their civil rights under 42 USC Sec. 1983 by

being prevented from using their land just like their neighbors, while the defendant Historic Society was allowed new construction just 100 ft. away.

"Equal protection of laws requires equal operation of laws upon all persons in like circumstances." Maxwell v Bugbee (1919) 250 US 525.

Discrimination of classification is not justified if the Town has another option of reaching the same goal (ie, preserving Petitioners property as open space). Witt, Elder: The Superior Court from A-Z. Congressional Quarterly Inc. Washington, DC: 1993. page 156.

The defendant Town has the **alternative** of **EMINENT DOMAIN.** If they want Petitioners property as a public park, they should purchase it, just as they have obtained other parcels.

"...affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use...by requiring land to be left substantially in its natural state ---carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." Annicelli v. South Kingston (1983) 463 A.2d 133, 140-141.

IMPACT of ALLOWING DECISION TO STAND

This case represents an important question affecting property rights and historic preservation. The U.S. Supreme Court needs to give guidance and clarification to the States to insure property rights, due process rights and equal protection under the law within Historic Districts, and Historic

Overlays of properties and structures everywhere. It is deemed necessary for the future of historic preservation that the U.S. Supreme Court exercise its power of supervision to protect all residents of Historic Districts and properties across America.

If this Connecticut decision is allowed to stand, the long term impact will be that citizens will no longer be willing to allow their property to be included within Historic Districts as the power of authority is vague and without limitation. The result will be counter productive to the goal of continued Historic Preservation.

The Court acted in violation of its own statutory and **constitutional rules** by supporting ZBA in preventing this legal subdivision. The Conn. Supreme Court decision is erroneous and wholly arbitrary, as there is no rational or factual basis for the judgment.

The petitioners have proven that "it was willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case." First National Bank of Fayetteville v. Smith 421 US 1371.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully submitted,

E. Don Smith Eileen Smith

E. Don Smith, Eileen Smith, pro ses
35 Strickland Rd.
Cos Cob, Conn. 06807
(203) 661-2883

January 5, 1994 Petitioners

A-P-P-E-N-D-I-X

APPENDIX - VOLUME I

CONNECTICUT SUPREME COURT DECISION...01A

LOCATED WITHIN **APPENDIX VOLUME II:**

AMICUS CURIAE BRIEF
CONNECTICUT BAR ASSOCIATION.....32A

APPELLATE COURT DECISON 53A

SUPERIOR COURT DECISION.....68A

ZONING BOARD OF APPEALS.....90A

PLANNING AND ZONING DENIAL.....94A

PLANNING AND ZONING PRELIMINARY
APPROVAL.....96A

E. DON SMITH ET AL. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH ET AL.
(14632)
(14633)

PETERS, C. J., CALLAHAN, BORDEN, BERDON and KATZ, Js.

The plaintiffs appealed to the trial court from a decision by the defendant zoning board of appeals of the town of Greenwich sustaining the planning and zoning commission's denial of their application to subdivide certain of their real property located in a historic district. The commission determined that granting the application would have disrupted the character of the historic district, and the board, after a de novo review of the application and a hearing on it, concluded, inter alia, that the proposed use of one of the lots to be created would not be consistent with the district's historic streetscape. The board also concluded that the proposed subdivision did not conform to the town plan of development. The trial court granted the motion of the Historical Society of the Town of Greenwich, Inc., to be made a defendant, and thereafter rendered judgment dismissing the plaintiffs' appeal, from which the plaintiffs, on the granting of certification, appealed to the Appellate Court. The Appellate Court concluded that the planning and zoning commission lacked the authority to promulgate subdivision regulations providing for the consideration of historical or architectural factors, and it reversed the judgment of the trial court. On the granting of certification, the defendants appealed to this court. *Held:*

1. The Appellate Court incorrectly determined that because the provision of the Greenwich town charter addressing subdivision applications does not specifically refer to historical factors, the commission lacked the authority to promulgate the regulations in issue here, which provided for the consideration of historical factors in connection with such appli-

cations; the charter provision giving the commission the power to protect "public health and safety" includes the power to protect the environment, which in turn includes historic preservation.

2. The Appellate Court correctly determined that the town charter prohibited the denial of a subdivision application, like the plaintiffs', on the basis of nonconformance with the town plan, the charter explicitly providing that a subdivision application cannot be denied solely on the basis of the town plan; the record revealed, however, that, as claimed by the defendants, there were alternative grounds on which the Appellate Court could have sustained the decision of the trial court, the commission being authorized to consider historical factors under the subdivision regulation that permits the commission in its discretion to require an environmental assessment.

3. The Appellate Court incorrectly concluded that the terms "historical factors" and "historic streetscapes" in the subdivision regulations at issue did not comply with the established rules requiring regulations to be reasonably precise, adequate and sufficient; the regulations here sufficiently apprised the plaintiffs of the factors that would be considered in evaluating their application.

4. The Appellate Court incorrectly concluded that it was the duty of the historic district commission, not the planning and zoning commission, to decide whether a building should be erected in a historic district; the applicable statute (§ 7-147c [j]) authorizes a historic district commission to cooperate with other regulatory agencies interested in preservation, and the statutes do not confer exclusive powers on a historic district commission.

5. The Appellate Court incorrectly concluded that the subdivision regulations encroached on an area that is uniquely a zoning power; the record did not indicate any conflict between the pertinent subdivision regulations and the applicable zoning regulations.

6. The plaintiffs could not prevail on their claim that the decision of the Appellate Court could be upheld on the ground that the denial of their subdivision application constituted an unconstitutional taking of their property without just compensation, they having failed to sustain their burden of proving that there were no other viable options for the property.

Argued April 28—decision released August 10, 1993

Appeal from a decision by the named defendant denying the plaintiffs' application to subdivide certain of their real property, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Cioffi, J.*, granted the motion to be made defendants filed by the Historical Society of the Town of

Greenwich, Inc., et al.; thereafter, the matter was tried to the court, *Ryan, J.*; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to the Appellate Court, *Daly, Norcott* and *Lavery, Js.*, which set aside the trial court's judgment and remanded the case with direction to render judgment sustaining the appeal and ordering the granting of the subdivision application, and the named defendant and the defendant Historical Society of the Town of Greenwich, Inc., et al., on the granting of certification, filed separate appeals to this court. *Reversed; judgment directed.*

Joyce H. Young, assistant town attorney, and *Everett E. Newtown*, with whom, on the brief, were *William E. Hegarty, Russell L. Brenneman* and *John C. Yavis, Jr.*, for the appellants (defendants).

E. Don Smith, pro se, with whom was *Eileen Smith*, pro se, the appellees (plaintiffs).

Robin Messier Pearson, Michael J. Cacace and *Mark K. Branse* filed a brief for the Planning and Zoning Law Section of the Connecticut Bar Association as amicus curiae.

KATZ, J. The dispositive issue in this appeal is whether the planning and zoning board of appeals for the town of Greenwich (board) is authorized, under the Greenwich town charter (charter) and the applicable subdivision regulations, to consider historical factors in determining whether to grant or deny an application to subdivide property located in a historic district. The defendants, the board, the Historical Society of the Town of Greenwich, Inc. (historical society), and Anita De Lesseps Keefe, a landowner within 100 feet of the property, appeal, upon our grant of certification,[1] from

[1] We granted certification to appeal the following issue: "In acting on a subdivision proposal that conforms to applicable zoning regulations, may a planning and zoning commission take into account the fact that the prop-

the judgment of the Appellate Court. The Appellate Court concluded that the board had not been authorized to consider historical factors in reviewing a subdivision application and reversed the judgment of the trial court. *Smith* v. *Zoning Board of Appeals*, 29 Conn. App. 28, 35, 614 A.2d 464 (1992). We disagree with the Appellate Court and, accordingly, reverse the judgment.

The following relevant facts are undisputed. The plaintiffs, E. Don Smith and Eileen Smith, own property located at 35 Strickland Road in Greenwich (property). The property is situated in the Mill Pond Historic District (district), which was established under article 5 of the charter and General Statutes § 7-147b. The property is also in an R-7 zone classification, which encompasses single homes.

In January, 1987, the plaintiffs submitted a preliminary subdivision application to the planning and zoning commission of the town of Greenwich (commission), seeking to subdivide the property into three lots. After a hearing, the commission preliminarily approved the plaintiffs' application, subject to the resolution of fourteen issues prior to the submission of the final application.[2] In particular, the commission required the

erty is located in a historic district and that the development of the property may be inconsistent with historic preservation of the district?" *Smith* v. *Zoning Board of Appeals*, 224 Conn. 912, 913, 617 A.2d 167, 168 (1992). In the proceeding at issue here, the zoning board of appeals acted, in effect, as the planning and zoning commission because it reviewed the challenged decision of the commission de novo. See footnote 4.

[2] The commission's preliminary approval provided the following: "1. That Lot 1 be shifted to the southerly property boundary of the tract. Concurrently that portion of the park and playground area displaced by the relocation of Lot 1 shall be moved to the northerly property line of Lot 1.

"2. The Commission observed that the area reserved for park and playground being 14.67%, conventionally required to be 15%, is acceptable as it is calculated from a gross area which includes a free-throw lot for which park and playground is not required.

"3. The utility easement shall be located so as to minimize impacts to significant trees.

04 A

plaintiffs to meet with the historic district commission "in order to determine an appropriate house location for lot 1." The commission further instructed that "[t]he preservation of significant trees shall be taken into consideration in determining house location, as well as conformity as nearby as possible to the existing setback/streetscape of house locations to the south."

Pursuant to the commission's requirement, the plaintiffs met with members of the historic district commis-

"4. The applicant shall meet with the Historic District Commission in order to determine an appropriate house location for Lot 1. The preservation of significant trees shall be taken into consideration in determining house location, as well as conformity as nearby as possible to the existing setback/streetscape of house locations to the south.

"5. The applicant shall meet with the Conservation Coordinator in order to develop tree preservation details as required by house and utility easement siting.

"6. That the Declaration of Restrictions for the reserved areas be submitted to the Law Department in accordance with the model document.

"7. That provisions for access easements be indicated on the record sheet.

"8. That the existing southerly curbcut be the sole accessway to Lot 1.

"9. That the appropriate utility easements to the northerly property (Ward) be indicated on the record sheet.

"10. That a sight line improvement plan indicating any modifications to existing features of walls and trees, etc., be submitted for review and approval by the Department of Public Works. Historic District Commission should also comment on alternate plans to achieve acceptable sight distance, if significant trees or the stone wall are adversely [a]ffected.

"11. The applicant must obtain a sewer permit prior to the issuance of a Building Permit.

"12. The applicant shall obtain confirmation from the Engineering Division that there will be no adverse impacts to nearby properties and water bodies due to site drainage.

"13. The following note is to appear on the construction sheet: 'Prior to any excavation(s) the applicant(s), in accordance with Public Act 77-350, shall be required to contact Call Before You Dig, Inc., at 1-800-922-4455 for markout of underground utilities.'

"14. Submit a driveway plan in accordance with Sec. 6-131 [of the Greenwich Municipal Code]. In the event significant open space or trees are impacted, it is recommended that the applicant apply for a variance in order to use as much of the existing driveway as possible while providing safe sight distance and maneuverability. The plan should be reviewed with Planning Staff, HDC [historic district commission] and D.P.W. [department of public works] prior to submitting final plan."

05 A

sion. Although, in the absence of a final, approved subdivision plan the historic district commission could not take any formal action concerning the appropriateness of the building on lot 1, the historic district commission did, nonetheless, express its opposition to the proposal.

The plaintiffs subsequently submitted a final subdivision application. On November 22, 1988, the commission denied the plaintiffs' final subdivision application because granting it would "permit construction of a house in the . . . significant open space, thereby disrupting the essential characteristic of the historic district."[3]

The plaintiffs appealed from the decision of the commission to the board pursuant to § 103 (a) of the char-

[3] The commission adopted the following final resolution: "WHEREAS, the Town of Greenwich Plan of Development, 1984 states as a basic development objective the preservation of historic and architectural resources; and

"WHEREAS, the subject lot is contained within the duly established Mill Pond Historic District, and

"WHEREAS, the Commission recognizes that the existing streetscape, which is defined by the open space of the subject tract in relation to adjoining historical properties, structures, and open spaces is a significant element of the historic district in terms of visual appearance as well as historic use and occupancy of the land; and

"WHEREAS, the subdivision would permit construction of a house in the previously defined, significant open space, thereby disrupting an essential characteristic of the historic district; and

"WHEREAS, a stated purpose of the Subdivision Regulations of the Town is to 'Further the orderly development of the Town in accordance with the Town Plan of Development' "; and

"WHEREAS, the Commission finds that there are other zoning options for development of the property which would provide for the same or greater number of dwelling units while preserving the site's open space and natural features which are significant components of the historic streetscape;

"THEREFORE, BE IT RESOLVED that final Subdivision #1066 of E. Don Smith and Eileen Smith owners of property located on Strickland Road consisting of a record sheet prepared by J.A. Kirby Company dated March 17, 1988 revised September 26, 1988 is hereby denied."

06 A

ter.[4] Pursuant to § 103 (a), the board conducted a de novo review of the application and held a public hearing. The board found that the plaintiffs were seeking to subdivide the property into three lots. Lot 1 would contain the plaintiffs' residence; lot 2 would contain an existing barn; and lot 3, a presently unimproved area in front of the plaintiffs' residence, would contain a single family house. The proposed building on lot 3 is the focus of this dispute.

Following the public hearing, the board denied the plaintiffs' appeal. The board concluded that the proposed building on lot 3 would disrupt the "sweeping front lawn" and, therefore, would not be consistent with the district's historic streetscape. The board stated that "[t]he proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260,[5] thereof. It does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape; namely, the historic streetscape." The board also concluded that the plaintiffs' application was subject to review under the Coastal Area Management Act (act), General Stat-

[4] Section 103 (a) of the Greenwich town charter provides: "The action of the Commission in approving or disapproving any subdivision may be reviewed by the Planning and Zoning Board of Appeals on petition by any Town agency, the Board of Education or the Housing Authority, by any person owning property in the Town, or by the person seeking approval of such subdivision, provided written notice of such petition is filed by the petitioner with the Commission and the Town Clerk within twenty (20) days from the effective date of such action. Upon receipt of such written notice, the Commission shall transmit a record of the proceedings had before it to the Planning and Zoning Board of Appeals which after a public hearing had de novo shall have the power to uphold or reverse such action."

[5] Section 6-260 of the Greenwich Land Use Regulations, also referred to as the subdivision regulations, provides in pertinent part: "PURPOSES OF ARTICLE. (a) The purposes of this Article shall be to: (1) Further the orderly development of the Town in accordance with the Town Plan of Development."

07A

utes § 22a-90 et seq. Applying the standards in the act, the board found that the subdivision proposal "would have an adverse impact on coastal resources because of the alteration of natural features of vistas."

The plaintiffs appealed from the decision of the board to the trial court pursuant to § 104 of the charter and General Statutes § 8-8 (2) (b).[6] Although the trial court disagreed with the applicability of one of the statutes, the act, on which the board had relied, the court concluded that other statutes, as well as the town's own land use regulations, supported the board's action. The trial court therefore dismissed the plaintiffs' appeal.

The trial court concluded that the board had the authority to consider the historic streetscape for three reasons: the provisions of the town's subdivision regulations, the statutory and town policy in favor of historic preservation and a restriction contained in the plaintiffs' deed. Section 6-260 provides that the purpose of the subdivision regulations is to "[f]urther the orderly development of the Town in accordance with the Town Plan of Development." Because the town plan has "as one of its 'Basic Objectives' the preservation of historic resources," the trial court concluded that the board acted within its authority in considering the historic streetscape. Additionally, § 6-266 (a) (20) of the Greenwich Land Use Regulations specifically permits an evaluation of historical factors, noted in § 6-266 (a) (19), in subdivisions located "within the coastal zone." Furthermore, the town's subdivision regulations are consistent with public policy favoring historic preservation

[6] Section 104 of the Greenwich town charter provides: "SUBDIVISION APPEALS. Any person aggrieved by an official action of the Planning and Zoning Board of Appeals may appeal therefrom in the manner and with the effect provided in Sec. 8-28 of the General Statutes."

General Statutes § 8-8 (2) (b) provides in pertinent part: "[A]ny person aggrieved by any decision of a board may take an appeal to the superior court for the judicial district in which the municipality is located."

08 A

that is contained in General Statutes § 7-147a et seq. and § 6-307 of the Greenwich Land Use Regulations. Finally, a restriction in the plaintiffs' deed states that " '[s]aid premises are conveyed subject to . . . [r]egulations imposed by reason of the fact that the premises are part of a historic district as established by the Town of Greenwich. . . .' "

The trial court affirmed the board's conclusion that the plaintiffs' subdivision proposal would impair the historic streetscape. The trial court reasoned that "[t]he Smiths' side of Strickland Road is characterized by homes on lots with sweeping front lawns. The plaintiffs plan to convert their front lawn into a building lot and construct thereon a house with the thirty feet by forty feet footprint, and setbacks of twenty-five feet from the front property line, twenty feet from the south property line, and fifteen feet from a line of trees. These exhibits show that construction of a house on the front lawn would drastically alter the streetscape, and support the Board's conclusion in that regard."

Finally, the trial court considered the plaintiffs' argument that "the denial of their plan constitutes a taking of property without due process of law." The court noted, however, that "[t]he Board rejected this claim, concluding that because other alternatives for development of the property exist, the plaintiffs were not deprived of their development rights. The defendant Board argues that [the] plaintiffs have failed to establish a diminution in the value of their property as a result of the decision, and further, only one proposal has been rejected, not all proposals."

Upon a grant of certification, the plaintiffs appealed to the Appellate Court, from the trial court's dismissal of their appeal. The Appellate Court reversed the judgment of the trial court, concluding that the board did not have the authority to consider historical factors in

09A

deciding whether to grant or deny a subdivision application because: "(1) the enabling statutes on subdivisions did not give the board the authority to include historical factors in its regulations; (2) the terms 'town plan of development,' 'historic factors' and 'historic streetscape' are not known and fixed standards required for subdivision regulations; (3) the Greenwich town charter forbids the board from denying a subdivision application based on the plan of development; and (4) it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district." *Smith* v. *Zoning Board of Appeals*, supra, 35. Having ourselves granted certification for the defendants to appeal, we now reverse the judgment of the Appellate Court.

I

In reviewing an appeal from an administrative agency, the trial court must determine whether " 'the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion.' " *Board of Education* v. *State Employees Retirement Commission*, 210 Conn. 531, 541, 556 A.2d 572 (1989); *Frito-Lay, Inc.* v. *Planning & Zoning Commission*, 206 Conn. 554, 573, 538 A.2d 1039 (1988). " 'The trial court may not retry the case or substitute its judgment for that of the agency . . . .' " *Board of Education* v. *State Employees Retirement Commission*, supra, 540; *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 265, 455 A.2d 339 (1983). The principal issue in this case, however, presents "questions of law turning upon the interpretation of statutes." *Board of Education* v. *State Employees Retirement Commission*, supra. The defendants dispute the Appellate Court's conclusion that no statutory or regulatory authority existed allowing the commission to consider historical factors. "[T]he construction of a statute on an issue that has not previ-

ously been subjected to judicial scrutiny is a question of law on which an administrative ruling is not entitled to special deference." (Internal quotation marks omitted.) Id.

A

The defendants claim initially that the Appellate Court incorrectly concluded that the commission lacked the authority to promulgate subdivision regulations that provide for the consideration of historical or architectural factors. We agree with the defendants.

"It has been said that the whole field of subdivision regulation is peculiarly a creature of legislation. It is therefore imperative that before subdivision regulations may be made operative, the necessary statutory authorization of such regulation must exist. . . . In other words, in order to determine whether the regulation in question was within the authority of the commission to enact, we do not search for a statutory prohibition against such an enactment; rather, we must search for statutory authority for the enactment." (Internal quotation marks omitted.) *Finn* v. *Planning & Zoning Commission*, 156 Conn. 540, 545, 244 A.2d 391 (1968). In determining whether the board had the authority to deny subdivision applications for historical reasons, we must first determine whether the commission has the authority to enact subdivision regulations that provide for such consideration. The town of Greenwich exercises its zoning power by virtue of a special act.[7] 26 Spec. Acts 325, No. 469 (1951). "This act established the [Greenwich Town Charter], which is the source of

[7] Municipalities in Connecticut may exercise zoning power either by adopting the provisions of chapter 124 of the General Statutes, §§ 8-1 through 8-13a, or by enacting a municipal charter authorized by a special act of the legislature. *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 263–64, 455 A.2d 339 (1983). "In either case, the power of the local zoning authority to adopt regulations is limited by the terms of the statute or special act." T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 42.

authority" to enact and enforce subdivision regulations. *Norwich* v. *Norwalk Wilbert Vault Co.*, 208 Conn. 1, 8, 544 A.2d 152 (1988); *O'Meara* v. *Norwich*, 167 Conn. 579, 581, 356 A.2d 906 (1975). "The charter serves as an enabling act, both creating power and prescribing the form in which it must be exercised. . . ." (Internal quotation marks omitted.) *West Hartford Taxpayers Assn., Inc.* v. *Streeter*, 190 Conn. 736, 742, 462 A.2d 379 (1983). "Agents of a city, including commissions, have no source of authority beyond the charter. *Perretta* v. *New Britain*, 185 Conn. 88, 92, 440 A.2d 823 (1981)." (Internal quotation marks omitted.) *Norwich* v. *Norwalk Wilbert Vault Co.*, supra, 8–9.

The charter is the source of authority governing subdivisions, except if there is a clear legislative intent that the General Statutes control. *Pizzola* v. *Planning & Zoning Commission*, 167 Conn. 202, 206, 355 A.2d 21 (1974). The power of the planning and zoning commission to adopt subdivision regulations is limited by the terms of the statute or special act. *Caldrello* v. *Planning Board*, 193 Conn. 387, 391, 476 A.2d 1063 (1984); *Bishop* v. *Board of Zoning Appeals*, 133 Conn. 614, 619, 53 A.2d 659 (1947); see, e.g., *Reed* v. *Planning & Zoning Commission*, 208 Conn. 431, 544 A.2d 1213 (1988). "The ordinance must rest primarily upon the enabling act and must not go beyond the power delegated by it." *Bishop* v. *Board of Zoning Appeals*, supra.

Section 83 of the charter established the planning and zoning commission. In addition to other powers granted to the commission by the charter, § 83 also conferred upon the commission "the powers and duties conferred upon zoning commissions under the General Statutes." Section 101 of the charter sets forth those areas that the commission's subdivision regulations are meant to control or regulate. Section 101 (d) provides that "[t]he regulations shall provide that the land to be subdivided shall be of such character that it can be used for build-

ing purposes without danger to health or the public safety, that proper provision shall be made for water, drainage and sewerage, and, in areas contiguous to brooks, rivers or other bodies of water subject to flooding, including tidal flooding, that provision shall be made for protective flood control measures and that the proposed streets are in harmony with existing or proposed principal thoroughfares shown in the Plan of Development as described in Section 94, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width, as to provide an adequate and convenient system for present and prospective traffic needs."[8] General Statutes § 8-25, the applicable section of the General Statutes, is substantially the same.

The plaintiffs argue that neither § 101 of the charter nor any other section of the charter addressing subdivisions specifically refers to historical factors. By contrast, there is specific language authorizing the commission to regulate and make provisions for such matters as water, drainage, sewage, flood control, street layout and grading, public utilities and the provision of parks and playgrounds. Greenwich Town Charter § 101 (d), (e) and (g). Thus, the plaintiffs maintain that because the charter specially refers to several items that must be provided for in the regulations, and does

[8] Section 101 of the Greenwich town charter provides in pertinent part: "(a) No subdivision of land shall be made until a plan for such subdivision has been approved by the Commission. Any person, firm or corporation making any subdivision of land without the approval of the Commission shall be fined not more than Two Hundred Dollars ($200.00) for each lot sold or so subdivided. . . .

"(c) Before exercising the powers granted in this Section the Commission shall adopt regulations covering the subdivision of land. No such regulations shall become effective until after a public hearing, notice of the time, place and purpose of which shall be given by publication in a newspaper of general circulation in the municipality at least seven (7) days prior to the date of such hearing, and until the same or any material amendment thereof, shall be approved by the Representative Town Meeting."

not expressly include the consideration of historical factors, the commission lacks the authority to enact subdivision regulations that allow consideration of historical factors.

The defendants claim, on the contrary, that the commission's authority to promulgate regulations that consider historical factors arises from § 101 (d) of the charter, which provides that subdivision "regulations shall provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to *health or the public safety* . . . ." (Emphasis added.) The defendants argue that public health and safety includes protecting the environment, which, in turn, includes historic preservation. We agree with the defendants.

Although neither the charter nor the General Statutes provides a specific definition of "public health and safety" in the context of zoning regulations, other related statutes establish that environmental conservation is a legitimate concern within this broad regulatory rubric. The Environmental Protection Act (EPA); General Statutes § 22a-1 et seq.; includes the environment as a facet of public health and safety. Section 22a-1 provides in part that "the policy of the state of Connecticut is to conserve, improve and protect its . . . *environment* . . . in order to enhance the *health, safety* and welfare of the people of the state." (Emphasis added.) In addition, the Inland Wetlands and Watercourses Act; General Statutes § 22a-28 et seq.; provides that "[t]he preservation and protection of the wetlands and watercourses . . . is essential to the health, welfare and safety of the citizens of the state. . . ." General Statutes § 22a-36; see *Mario* v. *Fairfield*, 217 Conn. 164, 168, 585 A.2d 87 (1991). These statutes illuminate the statutory phrase before us in this case because they address generally related subjects that the legislature may be presumed to have considered

in like manner. *Link* v. *Shelton*, 186 Conn. 623, 627, 443 A.2d 902 (1982). In light of these principles, we find a relationship between protecting the public health and safety and protecting the environment. Accordingly, we conclude that public health and safety includes consideration of the "environment."

Although this court has not defined the contours of the term "environment," we may look again to the meaning given to this term in other statutory provisions. *Link* v. *Shelton*, supra. Once it is established that "public health and safety" includes consideration of environmental concerns, the environmental statutes make it clear that historical factors are a recognized element of environmental law. The EPA in General Statutes § 22a-1c includes a broad definition of actions that significantly affect the environment: "activities . . . proposed to be undertaken by state departments, institutions or agencies . . . which could have a major impact on the state's . . . *historic structures* . . . ." (Emphasis added.) Additionally, General Statutes § 22a-19a states in part that the EPA "shall be applicable to the unreasonable destruction of *historic structures* and landmarks of the state, which shall be those properties (1) listed or under consideration for listing as individual units on the National Register of Historic Places (16 USC 470a, as amended) or (2) which are a part of a district listed or under consideration for listing on said national register and which have been determined by the state historic preservation board to *contribute* to the *historic significance of such district.*" (Emphasis added.) The EPA recognizes that the protection of many environmental concerns, such as air and water, is essentially the preservation of the resource that is being used. These regulations " 'guarantee that important land functions continue to operate while the land is being used, no matter what the use.' " T. Tondro, Connecticut Land Use Regulation

(2d Ed. 1992), p. 263. Similarly, the protection of historical factors is a preservation of the function of the resource being used. Id.; see *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 108, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) ("[h]istoric conservation is but one aspect of the much larger problem, *basically an environmental one*, of enhancing . . . the quality of life for people" [emphasis added; internal quotation marks omitted]). We note, as well, that we have interpreted the power to protect the "general welfare" to include the authority to consider historical factors. *Figarsky* v. *Historic District Commission*, 171 Conn. 198, 207–209, 368 A.2d 163 (1976).

Accordingly, we conclude that because the phrase "public health and safety" includes environmental factors, it includes historical factors. The commission, therefore, had the authority to promulgate subdivision regulations that take into account historical factors.

B

We next must address whether the Appellate Court correctly determined that the town's charter prohibits the board from denying a subdivision application on the basis of nonconformance with the town plan.[9] We agree with the Appellate Court's conclusion that the board may not deny a subdivision application solely on the basis of nonconformance with the town plan.

[9] Although the plaintiffs did not raise this claim in the trial court, "[t]he court may in the interest of justice notice plain error not brought to the attention of the trial court." Practice Book § 4185; *Ralto Developers, Inc.* v. *Environmental Impact Commission*, 220 Conn. 54, 59, 594 A.2d 981 (1991). " 'We have noticed plain error in the failure of the trial court to apply a clearly relevant statute to the case before it.' " *Ralto Developers, Inc.* v. *Environmental Impact Commission*, supra; *State* v. *Hinckley*, 198 Conn. 77, 88, 502 A.2d 388 (1985). Because this charter limitation is applicable law, we will address it. *Cunningham* v. *Cunningham*, 72 Conn. 157, 160, 44 A. 41 (1899).

16A

In its decision, the board made clear that it denied the plaintiffs' subdivision application because it was not in conformance with the plan. As the Appellate Court noted, § 98 (b) of the charter states that "[t]he Commission shall not refuse approval of any subdivision on the ground that such subdivision creates or will tend to create a use of land contrary to that shown upon the Plan of Development, except insofar as the Commission may, under Section 101, require the streets and drains in such subdivision to conform to the street and drainage system shown on the Plan of Development."

"When a charter is construed the rules of statutory construction generally apply." *Arminio* v. *Butler*, 183 Conn. 211, 217, 440 A.2d 757 (1981). "In arriving at the intention of the framers of the charter the whole and every part of the instrument or enactment must be taken and compared together. In other words, effect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws. The real intention when once accurately and indubitably ascertained, will prevail over the literal sense of the terms. When the words used are explicit, they are to govern, of course. If not, then recourse is had to the context, the occasion and necessity of the provision, the mischief felt, and the remedy in view." (Internal quotation marks omitted.) Id., 217–18.

The charter explicitly provides that a subdivision application cannot be denied solely on the basis of the town plan. "[W]here the language is plain, we must give effect to the intention expressed in the regulation." *Schwab* v. *Zoning Board of Appeals*, 154 Conn. 479, 483, 226 A.2d 506 (1967). The charter limitation is consistent with this court's prior recognition that a town plan is merely advisory. *Lathrop* v. *Planning & Zoning Commission*, 164 Conn. 215, 223, 319 A.2d 376 (1973); *Spada* v. *Planning & Zoning Commission*, 159 Conn. 192, 200, 268 A.2d 376 (1970); *Dooley* v. *Town Plan*

& Zoning Commission, 154 Conn. 470, 473, 226 A.2d 509 (1967). The purpose of the plan is to set forth the most desirable use of land and an overall plan for the town. Greenwich Town Charter §§ 94, 97; see *Mott's Realty Corporation* v. *Town Plan & Zoning Commission*, 152 Conn. 535, 538, 209 A.2d 179 (1965). *Purtill* v. *Town Plan & Zoning Commission*, 146 Conn. 570, 572, 153 A.2d 441 (1959). Because the overall objectives contained in the town plan must be implemented by the enactment of specific regulations, the plan itself can operate only as an interpretive tool. See, e.g., *Raybestos-Manhattan, Inc.* v. *Planning & Zoning Commission*, 186 Conn. 466, 475, 442 A.2d 65 (1982). We agree, therefore, with the Appellate Court that the board incorrectly denied the plaintiffs' subdivision on the ground that it was inconsistent with the town plan.

C

Our conclusion that the board incorrectly denied the plaintiffs' application on the basis of noncompliance with the town plan would ordinarily require that we affirm the Appellate Court's judgment. On appeal to the Appellate Court, as well as on appeal to this court, however, the defendants raised alternative grounds in their briefs upon which the trial court's decision may be affirmed. After review of the defendants' arguments, we conclude that the Appellate Court incorrectly dismissed one of these alternate grounds. "[T]his court is authorized to rely upon alternative grounds supported by the record to sustain a judgment. . . . 'The . . . judgment will be affirmed, though based on erroneous grounds, if the same result is required by law.' " *Henderson* v. *Department of Motor Vehicles*, 202 Conn. 453, 461, 521 A.2d 1040 (1987); *Ivey, Barnum & O'Mara* v. *Indian Harbor Properties, Inc.*, 190 Conn. 528, 532, 461 A.2d 1369 (1983); *A & H Corporation* v. *Bridgeport*, 180 Conn. 435, 443, 430 A.2d 25 (1980); *Johnny Cake, Inc.* v. *Zoning Board of Appeals*, 180

Conn. 296, 301, 429 A.2d 883 (1980); C. Tait, Connecticut Appellate Practice and Procedure (1991) § 7.14. We conclude that the trial court correctly concluded that the board was authorized, under the subdivision regulations, to consider historical factors when it acted on the application.

In construing regulations, the general rules of statutory construction apply. *Schwartz* v. *Planning & Zoning Commission*, 208 Conn. 146, 153, 543 A.2d 1339 (1988) (applying rules of statutory construction to interpretation of zoning regulations); see *Ghent* v. *Planning Commission*, 219 Conn. 511, 518–19, 594 A.2d 5 (1991); *Sonn* v. *Planning Commission*, 172 Conn. 156, 159–60, 374 A.2d 159 (1976). The commission is limited by the power conferred upon it by the subdivision regulations. See *Reed* v. *Planning & Zoning Commission*, 208 Conn. 431, 544 A.2d 1213 (1988) (planning commission cannot exercise a power that has been admittedly delegated to it, unless its own regulations give it the right to exercise that power). Section 6-266 (a)[10] of the Greenwich

[10] Section 6-266 (a) of the Greenwich Land Use Regulations provides in pertinent part: "The preliminary layout shall include as many of the following items of information as is practicable. . . .

"(19) For a subdivision of ten (10) lots or more or the subdivision of ten (10) or more acres, an environmental assessment by qualified environmental specialists shall be provided. The Commission may require said assessment for smaller subdivisions if deemed necessary. The assessment shall include an evaluation of the following:

"(a) Conformance with the Open Space Plan of Development

"(b) Significant wetlands

"(c) Steep Slopes

"(d) Stormwater Drainage

"(e) Soils capabilities

"(f) Vegetation including forested areas and the identification of trees over 10" in caliper when not part of forested areas

"(g) Significant geological formations

"(h) Historical and archaeological factors

"(i) Animal habitats

"(j) Water availability and quality

Land Use Regulations sets forth the information that should be included in a preliminary subdivision application. "The preliminary layout shall be considered as a helpful guide in the preparation of a subdivision plan and should include the information set out in Section 6-266." Greenwich Land Use Regs. § 6-265. Subsection (a) of § 6-266 states that "[t]he preliminary layout shall include as many of the following items of information as is practicable." This general statement, set forth at the beginning of the regulation, indicates the commission's intent to require only the information that is pertinent to a particular subdivision application.

Section 6-266 (a) (19)[11] permits the commission in its discretion to require an environmental assessment in the preliminary layout of subdivisions of fewer than ten lots or ten acres.[12] Subsection (a) (19) lists twelve relevant considerations, including "[h]istorical and archaeological factors." Greenwich Land Use Regs. § 6-266 (a) (19) (h). In this case, the commission requested an evaluation by the historic district commission of the historic implications of the subdivision application. It also requested an evaluation by the required experts of some of the other considerations listed in § 6-266 (a) (19). It did not request that each and every one of these items be evaluated, presumably because it did not see such a need.

The plaintiffs argue that § 6-266 does not apply because the commission did not formally request an

"(k) Aquifer protection in accordance with the Statutes of the State of Connecticut

"(*l*) Other data which the Commission deems appropriate.

"The environmental assessment shall be subject to a review, after the receipt of recommendations of the Conservation Commission, by the Planning and Zoning Commission including the mitigation measures for minimizing environmental impact before the applicant proceeds to final plan."

[11] See footnote 10 for the text of Greenwich Land Use Regs. § 6-266 (a) (19).

[12] The property comprises fewer than ten acres or ten lots.

"environmental assessment." The consequence of the plaintiffs' argument is that, unless the commission formally requests each item of information by calling it an "environmental assessment," the commission cannot consider potentially relevant information. We decline to accept such a narrow construction of the regulation.

Regulations are to be construed as a whole. *Forest Construction Co.* v. *Planning & Zoning Commission*, 155 Conn. 669, 679, 236 A.2d 917 (1967). There is nothing in § 6-266 (a) that specifically requires that the commission label its request for information an "environmental assessment." Rather, "environmental assessment" is a general label for the types of information that the commission is authorized to consider in its determination of subdivision applications. Further, the intent of the preliminary layout is to convey relevant information to the commission in order to facilitate the process. This intent is indicated by the overall description of what should be included in a layout in § 6-266 (a), which states that the "preliminary layout shall include as many of the following items of information as is practicable."

The plaintiffs further argue that the commission did not consider a full environmental assessment as required by the language of § 6-266 (a) (19), which states that "[t]he assessment *shall* include an evaluation of the following . . . ." (Emphasis added.) The plaintiffs contend that this regulation makes it mandatory that each of the twelve factors listed be included in an assessment of the property to be subdivided. We disagree.

Although subsection (a) (19) of § 6-266 employs the word "shall," it does not make sense to require the commission to evaluate factors that are not relevant to a particular subdivision. Whether the word "shall" is

mandatory or precatory depends upon its context. See, e.g., *Caron* v. *Inland Wetlands & Watercourses Commission*, 222 Conn. 269, 273, 610 A.2d 584 (1992). In construction of the words of a regulation, like those of a statute, common sense must be used. *Police Department* v. *State Board of Labor Relations*, 225 Conn. 297, 303, 622 A.2d 1005 (1993). The items listed to be considered include some specific items that will not be implicated in every subdivision application. For example, in addition to historical and archaeological factors, the list includes animal habitats, significant geological formations and aquifer protection. Greenwich Land Use Regs. § 6-266 (a) (19) (g), (i) and (k). Not every subdivision application will require the consideration of each of these factors. It would be a waste of time, money and energy for the participants involved to be required to gather information that is not relevant to the subdivision application.

In addition, § 6-296 (d) of the Greenwich Land Use Regulations explicitly permits the commission to require a redesign of a subdivision plan "in order to protect environmental or historic resources" if the environmental assessment indicates the need for a redesign. Thus, the regulations specifically anticipate a situation, like the one at hand, where historical preservation requires the redesign of subdivision plans.

We also must look to the overall intent of the applicable regulations in considering subdivision applications. *Forest Construction Co.* v. *Planning & Zoning Commission*, supra. "Regulations, like statutes, do not exist in a vacuum." *Bombero* v. *Planning & Zoning Commission*, 218 Conn. 737, 743, 591 A.2d 390 (1991). As noted above, § 6-266 (a) requires the consideration of only that information that is necessary. Additionally, the purpose of the subdivision regulation is to "[f]urther the orderly development of the Town in accordance with the Town Plan of Development."

Greenwich Land Use Regs. § 6-260 (a) (1). Although, as noted above, the town plan cannot itself support the denial of a subdivision application, its provisions can serve as an interpretative guide to the meaning of properly enacted regulations. The plan has as one of its basic objectives the preservation of historic resources. The plan also provides that "Greenwich has a rich . . . historical heritage that should be protected for the benefit and enlightenment of future generations," and that "[c]onserving the Town's . . . historical resources is a notably effective land use tool for preserving the essential character and spirit of the community."

Accordingly, we conclude that § 6-266 (a) (19) (h) expressly permits the commission to consider historical factors.[13]

II

The defendants next claim that the Appellate Court incorrectly concluded that the terms "historical factors" and "historic streetscapes" do not comply with the established rules requiring regulations to be reasonably precise, adequate and sufficient. We agree with the defendants.

The standard for determining the adequacy of subdivision regulations is whether they " 'are as reasonably precise as the subject matter requires and are reasonably adequate and sufficient to guide the commission and to enable those affected to know their rights and obligations.' " *Nicoli* v. *Planning & Zoning Commission*, 171 Conn. 89, 93, 368 A.2d 24 (1976); *Forest Construction Co.* v. *Planning & Zoning Commission*,

[13] Because we conclude that the commission has authority under the charter and subdivision regulations to consider historical factors, we need not address whether the Coastal Area Management Act; General Statutes §§ 22a-90 through 22a-112; also allows the commission to consider historical factors.

supra, 680. Although some standards may be general, the regulation must be " 'reasonably sufficient to identify the criteria to be evaluated in their enforcement in order to meet the many variables involved since it would be impossible to establish one standard which would adequately cover all future cases.' " *Nicoli* v. *Planning & Zoning Commission*, supra, 93.

In this case, the commission's subdivision regulations sufficiently apprised the plaintiffs that historical factors would be considered in evaluating their subdivision application. In evaluating the regulations, we must construe them "as a whole since particular words or sections of the regulations, considered separately, may be 'lacking in precision of meaning to afford a standard sufficient to sustain' them." *Forest Construction Co.* v. *Planning & Zoning Commission*, supra, 679; *Ghent* v. *Planning Commission*, supra, 517; *Sonn* v. *Planning Commission*, supra, 162. Although § 6-266 (a) (19) does not specifically define the term historical factors, the general purpose of the regulations specifically references the town plan. Section 6-260 (a) (1) states that "[t]he purposes of this Article shall be to (1) [f]urther the orderly development of the Town in accordance with the Town Plan of Development." This reference puts prospective subdivision applicants on notice that the town plan will help define the specific terms in the subdivision regulations.

The plan has as one of its basic objectives "[t]o preserve historic and architectural resources." In its further discussion of the preservation of historical resources, the plan specifically mentions historical "streetscapes and districts" as important aspects of Greenwich that the town wishes to preserve. In a subsequent section, the plan states that "[t]he following considerations should be the starting point for decision-making . . . [t]he goal is to sustain a climate where . . . historic streetscapes can be preserved." These

specific references to streetscapes, the historical factor at issue in this case, define one aspect of "historical factors" and certainly apprised the plaintiffs that this would be a consideration in their subdivision application.

The consideration of historical factors does not occur in a vacuum. See *Bombero* v. *Planning & Zoning Commission*, supra. "It is unrealistic to demand detailed standards which are impracticable or impossible." *Forest Construction Co.* v. *Planning & Zoning Commission*, supra, 679. The term historic factors derives meaning from the physical environment of the historic district. See *A-S-P Associates* v. *Raleigh*, 298 N.C. 207, 223, 258 S.E.2d 444 (1979). In the context of a historic district, there are identifiable and sufficiently distinct historical standards by which the commission may be guided. These same characteristics also put property owners on notice of the types of historical factors that will be considered. "Although . . . discretion cannot be entirely eliminated because of the subjective nature of this process"; *Bellevue Shopping Center Associates* v. *Chase*, 574 A.2d 760, 764 (R.I. 1990); the board is confined to the relevant historic period in its consideration of historical factors.

Accordingly, we conclude that the standards set forth in the regulations and the plan are reasonably precise and sufficient to guide the commission. Accord *Maher* v. *New Orleans*, 516 F.2d 1051, 1067 (5th Cir. 1975), cert. denied, 426 U.S. 905, 96 S. Ct. 2225, 48 L. Ed. 2d 830 (1976); *Bellevue Shopping Center Associates* v. *Chase*, supra, 764–65; see generally *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 263–64, 455 A.2d 339 (1983); *Figarsky* v. *Historic District Commission*, supra, 207–209 (implicitly endorsing the adequacy of "historical factors" to guide municipal agencies and applicants); see also *Carlson* v. *Fisher*, 18 Conn. App. 488, 506–507, 558 A.2d 1029 (1989)

(referencing streetscape).[14] The Appellate Court was, therefore, incorrect in concluding that the regulations did not support the action taken by the commission.

III

The defendants also challenge the Appellate Court's conclusion that "it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district." *Smith* v. *Zoning Board of Appeals*, 29 Conn. App. 28, 35, 614 A.2d 464 (1992). We disagree with the Appellate Court because we conclude that the historic district commission does not exercise exclusive statutory jurisdiction to rule on changes affecting the historic character of a historic district.

The historic district commission and the planning and zoning commission perform different yet sometimes overlapping functions. The historic district commission is authorized to make its own independent determination of whether a proposed building or alteration is consistent with the historic district. General Statutes § 7-147f. "Absent a statutory provision designating which commission is to have overriding responsibility, [however,] the fact that the legislature has given responsibility to more than one agency suggests that each must exercise its own authority, using its standards and procedures, regardless of what the other agencies do under their delegation of power from the state." T. Tondro, supra, p. 50. The General Statutes do not confer exclusive powers on the historic district commission. To the contrary, General Statutes

[14] The plaintiffs also argue that they have been deprived of their due process rights because the phrases historical factors and historic streetscape did not provide sufficient notice as to whether they could subdivide and build on their property. Our conclusion that "historical factors" and "historic streetscape" are reasonably precise terms, thereby putting the plaintiffs on adequate notice, disposes of this argument.

§ 7-147c (j) authorizes the historic district commission to cooperate with other regulatory agencies interested in preservation and to initiate planning and zoning proposals on their behalf. Moreover, we have recognized concurrent agency jurisdiction in other areas. See, e.g., *Wright* v. *Woodridge Lake Sewer District*, 218 Conn. 144, 147–48, 588 A.2d 176 (1991) (sewer and zoning agencies); *Mario* v. *Fairfield*, 217 Conn. 164, 169–70, 585 A.2d 87 (1991) (department of environmental protection and inland wetlands commission).

Accordingly, we conclude that the historic district commission's authorization to consider historical factors does not foreclose the commission from considering historical factors. The Appellate Court was mistaken in ruling to the contrary.

IV

The defendants next argue that the Appellate Court incorrectly concluded that the board's consideration of the subdivision regulations improperly encroached upon the applicable zoning regulations. The plaintiffs claim, to the contrary, that because it is undisputed that the application conformed with the zoning requirements of an R-7 zone, it could not be denied on the basis of nonconformance with subdivision regulations. *Smith* v. *Zoning Board of Appeals*, supra, 37. We agree with the defendants.

Citing *Cristofaro* v. *Burlington*, 217 Conn. 103, 107, 584 A.2d 1168 (1991), the Appellate Court concluded that the commission lacked the authority "to include historical factors in its regulations" because "[s]ubdivision regulations cannot impose minimum lot size, shape, width and depth requirements greater than those required under the zoning regulations for the zone where the property is to be subdivided or deny approval of lots that meet all zoning requirements." *Smith* v. *Zoning Board of Appeals*, supra, 36. *Cristofaro*, how-

ever, is inapposite. In *Cristofaro*, the planning and zoning commission enacted a regulation that directly intruded on a subject that was exclusively a zoning matter. See *Avonside, Inc.* v. *Zoning & Planning Commission*, 153 Conn. 232, 238–39, 215 A.2d 409 (1965) (fees in subdivision regulations in excess of fees in zoning regulations invalid). A subdivision regulation may not conflict with applicable zoning regulations.[15]

Although subdivision regulations and zoning regulations have separate functions, landowners must comply with the requirements of each applicable regulation. *Vose* v. *Planning & Zoning Commission*, 171 Conn. 480, 483, 370 A.2d 1026 (1976); see *Cristofaro* v. *Burlington*, supra, 106; *Sheridan* v. *Planning Board*, 159 Conn. 1, 9, 266 A.2d 396 (1969). Only if the commission enacts subdivision regulations that exclusively concern zoning power, or if the subdivision regulations directly conflict with a zoning power, will the subdivision regulation be invalid. *Cristofaro* v. *Burlington*, supra, 107; *Avonside, Inc.* v. *Zoning & Planning Commission*, supra.

In this case, the subdivision regulations neither encroach upon an area that is uniquely a zoning power, nor directly conflict with applicable zoning regulations. As we discussed above, § 101 (d) of the charter permits the commission to enact regulations that consider historical factors. Although General Statutes § 8-2[16] authorized the zoning commission to enact zoning regulations that consider historical factors, the parties have

[15] General Statutes § 8-26 provides in pertinent part: "The commission shall have the authority to determine whether the existing division of any land constitutes a subdivision or resubdivision under the provisions of this chapter, provided nothing in this section shall be deemed to authorize the commission to approve any such subdivision or resubdivision which conflicts with applicable zoning regulations." See *Ferndale Dairy, Inc.* v. *Zoning Commission*, 148 Conn. 172, 176, 169 A.2d 268 (1961).

[16] General Statutes § 8-2 provides in pertinent part: "Zoning regulations may be made with reasonable consideration for the protection of historic factors . . . ."

not pointed to any zoning regulation that does so. The record therefore does not indicate any conflict between the pertinent subdivision regulations and any of the applicable zoning regulations.

Accordingly, the zoning regulations in this case do not prevent the board's review of historical factors in considering whether to grant or deny the plaintiffs' subdivision application. The Appellate Court was mistaken in relying on a conceived conflict of regulations as a ground for sustaining the plaintiffs' appeal.

V

Last, the plaintiffs argue, as an alternate ground for affirming the judgment of the Appellate Court, that the denial of their subdivision application results in an unconstitutional taking of their property without just compensation. Because the plaintiffs have not met their burden of proving that there are no viable options for the property, we conclude that this claim cannot be sustained.

The plaintiffs claim that the board's denial of their subdivision application was a practical confiscation of their land and that they have no viable alternatives. The board rejected the plaintiffs' contention, concluding that other alternatives for development of their land exist and that the plaintiffs therefore had not been deprived of their due process rights. Although the trial court acknowledged that the plaintiffs had advanced this argument, it did not resolve it and the plaintiffs did not ask the trial court to articulate its reasons for failing to do so.

The plaintiffs have the burden of proving that they have been finally deprived by the board of the use of their property. *Gil* v. *Inland Wetlands & Watercourses Agency*, 219 Conn. 404, 415, 593 A.2d 1368 (1991); *Bom-*

bero v. *Planning & Zoning Commission*, supra, 746; *Brecciaroli* v. *Commissioner of Environmental Protection*, 168 Conn. 349, 357, 362 A.2d 948 (1975). We have held that a final deprivation has occurred when there were no economically viable uses of the land; *Dooley* v. *Town Plan & Zoning Commission*, 151 Conn. 304, 311, 197 A.2d 770 (1964); see *Gil* v. *Inland Wetlands & Watercourses Agency*, supra; or there has been a practicable confiscation of the entire property.

In this case, the board found, as a matter of fact, that other viable options exist for the development of the plaintiffs' property. The board's rejection of the plaintiffs' subdivision application does not lead to the conclusion that other plans will be denied as well and the trial court has made no relevant findings to the contrary. " '[u]ntil it appears that the plaintiff[s] [have] been finally deprived . . . of the reasonable and proper use of the property, it cannot be said that there has been an unconstitutional taking of property without just compensation.' " *Luf* v. *Southbury*, 188 Conn. 336, 351–52, 449 A.2d 1001 (1982).[17] Consequently, we cannot conclude that there has been a taking. *Gil* v. *Inland Wetlands & Watercourses Agency*, supra; *Luf* v. *Southbury*, supra, 354; *Brecciaroli* v. *Commissioner of Environmental Protection*, supra, 358.[18]

[17] The plaintiffs refer to testimony by the board commissioner concerning the option of building condominiums on the property. On the basis of the commissioner's speculation that the historic district commission would not grant a certificate of appropriateness, the commissioner suggested that this option was not worth discussing. Contrary to the plaintiffs' contention, this testimony does not establish that the board believes that there are no viable alternatives.

[18] The plaintiffs also claim that the subdivision regulations have been unequally applied to them and throughout the historic district. The plaintiffs, however, only peripherally raised this claim before the board and never corroborated it with evidence. Because the record is insufficient, we decline to review this claim.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's judgment dismissing the plaintiffs' appeal.

In this opinion the other justices concurred.

(2)

Supreme Court, U.S.
FILED
JAN 5 1994
OFFICE OF THE CLERK

93-1092

No._____

In The
SUPREME COURT OF THE UNITED STATES
October term, 1993

E.Don Smith pro se, Eileen Smith pro se
Petitioners

v.

Zoning Board of Appeals of the
Town of Greenwich
of the State of Connecticut et al.
Respondents

APPENDIX
Petition for a Writ of
Certiorari to the
United States Supreme Court

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered in this proceeding on August 10, 1993. (14632) (14633)

E. Don Smith & Eileen Smith
pro ses, Petitioners
35 Strickland Rd. Cos Cob,
Connecticut, 06807
(203) 661-2883

January 5, 1994

---

68 pp

APPENDIX - VOLUME II

AMICUS CURIAE BRIEF
CONNECTICUT BAR ASSOCIATION.....32A

APPELLATE COURT DECISON 53A

SUPERIOR COURT DECISION.....68A

ZONING BOARD OF APPEALS.....90A

PLANNING AND ZONING DENIAL.....94A

PLANNING AND ZONING PRELIMINARY
APPROVAL.....96A

SUPREME COURT
of the
STATE OF CONNECTICUT

S.C. 14632
E.DON SMITH AND EILEEN SMITH
v.
ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH, THE HISTORICAL SOCIETY OF THE TOWN OF GREENWICH, INC. AND ANITA de LESSEPS KEEFE

AMICUS CURIAE BRIEF OF PLANNING AND ZONING LAW SECTION OF THE CONNECTICUT BAR ASSOCIATION

For the Amicus Curiae Planning and Zoning Law Section of the Connecticut Bar Association:

ROBIN MESSIER PEARSON, ESQ
LEVY & DRONEY, P.C.
74 Batterson Park Rd.
Farmington, Ct, 06032

MICHAEL J. CACACE, ESQ
D'ANDREA & CACACE
777 Summer Street
Stamford, CT 06901

MARK K. BRANSE, ESQ
124 Hebron Avenue
Glastonbury, CT 06033

TABLE OF CONTENTS

STATEMENT OF ISSUE OF AMICUS CURIAE..iii

TABLE OF AUTHORITIES.....iv

ARGUMENT.....1

I. A PLANNING AND ZONING COMMISSION MAY NOT DENY A SUBDIVISION APPLICATION ON THE BASIS THAT THE PROPERTY IS LOCATED IN AN HISTORIC DISTRICT AND THAT THE DEVELOPMENT OF THE PROPERTY MAY BE INCONSISTENT WITH THE HISTORIC PRESERVATION OF THE DISTRICT.....1

A. The Powers Of An Administrative Land Use Agency Are Strictly Proscribed By The Parameters Of Its Enabling Legislation Be It By Special Act Or Pursuant To Connecticut General Statutes.....2

B. Assuming, Arguendo, That Defendant Was Authorized By Its Charter To Promulgate Regulations Allowing Denial Of A Subdivision For Its Impact On Historic Preservation Goals, Defendant's Regulations Did Not Contain Known And Fixed Historical Review Standards To Guide It.....8

C. Defendant's Reliance On The Plan Of Development As A Source Of Authority To Consider Historical Factors Is Misplaced 9

D. The Regulations Use The Words Historic Or Historical In Only Two Provisions And These Provisions Are Not Relevant To This Application.....11

II. CONCLUSION 12

CERTIFICATE OF SERVICE.....14

APPENDIX 15

STATEMENT OF ISSUE OF AMICUS CURIAE

In acting on a subdivision proposal that conforms to applicable zoning regulations, may a planning and zoning commission take into account the fact that the property is located in an historic district and that the development of the property may be inconsistent with historic preservation of the district?

TABLE OF AUTHORITIES

CASES

Arminio vs. Butler, 183 Conn. 211, 217, 440 A. 2d. 757 (1981).....3

Avonside, Inc. vs. Zoning and Planning Commission of Town of Avon, 153 Conn. 232, 236, 215 A. 2d 409, 411 (1965).....5

Bishop vs. Board of Zoning Appeals, 133 Conn. 614, 619, 53 A.2d 659 (1947).....2

Caldrello vs. Planning Board of New London, 193 Conn. 387, 391, 476 A.2d 1063 (1984).....2

City Council of West Haven v. Hall, 180 Conn. 243, 250 429 A.2d 481 (1980).....4

Dowling vs. Zoning Board of Appeals of Old Lyme, 187 Conn. 689, 694, 447 A. 2d 1172, 1174 (1982).....3

E. Don Smith, et al, vs. Zoning Board of Appeals of the Town of Greenwich, 29 Conn. App. 28 (1992).....1

Finn, Trustee vs. Planning and Zoning Commission of the Town of Seymour, 156 Conn. 540, 545, 244 A. 2d 391, 393 (1968).....4, 5

Ghent v. Planning Commission of the City of Waterbury, 219 Conn. 511, 594 A.2d 5 (1991).....7, 9

Ghent v. Zoning Commission of the City of Waterbury, 220 Conn. 584, 588, 600 A.2d 1010, 1012, (1991).....2

Harlow vs. Planning & Zoning Commission of Westport, 194 Conn. 187, 193, 479 A. 2d 808, 812 (1984).....3

Pizzola vs. Planning & Zoning Commission of Town of Plainville, 167 Conn 202, 206, 355 A. 2d 21, 24 (1974).....3

Reed vs. Planning and Zoning Commission, 208 Conn. 431, 435, 544 A.2d 1213 (1988).....6, 9

Simons vs. Canty, 195 Conn. 524, 529, 488, A.2d 1267, 1270 (1985).....2, 5

STATUTES

CONN. GENERAL STATUTE $ 7-147.....6, 10

CONN. GENERAL STATUTE $ 7-148 (C) (8)..6

CONN. GENERAL STATUTE $ 8-25.....2,3

CONN. GENERAL STATUTE $ 8-26.....8

CONN. GENERAL STATUTE $ 22a-1a.....6

ARGUMENT

The Planning and Zoning Law Section of the Connecticut Bar Association, as amicus curiae, asks this Court to affirm the decision reached by the Connecticut Appellate Court in E. Don Smith, et al, vs. Zoning Board of Appeals of the Town of Greenwich, 29 Conn. App. 28 (1992). Except as provided herein, the amicus curiae rely on the statement of facts and nature of the proceedings as set out in that decision. The interest of amicus derives from the position as an impartial Court-invited commentator on a land use issue of interest to the PLanning and Zoning Law Section.

I. A PLANNING AND ZONING COMMISSION MAY NOT DENY A SUBDIVISION APPLICATION ON THE BASIS THAT THE PROPERTY IS LOCATED IN AN HISTORIC DISTRICT AND THAT THE DEVELOPMENT OF THE PROPERTY MAY BE INCONSISTENT WITH THE HISTORIC PRESERVATION OF THE DISTRICT.

The Defendant-appellant Planning & Zoning Board of Appeals of the Town of Greenwich ("Defendant") argues that the Town's Charter and certain other enumerated General Statutes permit it to consider historic factors in deciding a subdivision application, and that Defendant's subdivision regulations are sufficiently adequate and precise to allow an applicant to know on what basis historical factors are to be applied to the subdivision analysis. Defendant also argues that it is authorized to look to the Town's Plan of Development to quide it in this matter. We think not for the reasons discussed below.

A. The Powers Of An Administrative Land Use Agency Are Strictly Proscribed By the Parameters Of Its Enabling Legislation Be It By Special Act Or Pursuant To Connecticut General Statutes.

Public officials can only act within the scope of the powers and duties which the law prescribes for them. Ghent v. Zoning Commission of the City of Waterbury, 220 Conn. 584, 600 A.2d 1010, 1012 (1991). Municipalities have no inherent legislative powers and can only exercise those powers expressly granted to them by the Legislature, or powers which are necessary to carry out an expressly delegated power or duty. Simons vs. Canty, 195 Conn. 524, 529, 488 A.2d 1267, 1270 (1985). All towns exercising control over the subdivision of land in Connecticut do so under either the statutory delegation of the general enabling statute, Conn. Gen. Stat. §8-25, or pursuant to a municipal charter adopted as a special act of the legislature. In either case, the power of the local planning authority to adopt subdivision regulations is limited by the terms of the statute or special act. Caldrello vs. Planning Board of New London, 193 Conn. 387, 391, 476 A.2d 1063 (1984). Bishop vs. Board of Zoning Appeals, 133 Conn. 614, 619, 53 A.2d 659 (1947).

Defendant initially received its authority to approve or disapprove subdivisions from Special Act 469 ("Act") (Appendix A-1). The Act was subsumed within the Charter for the Town pursuant to "AN ACT PROVIDING A HOME RULE CHARTER FOR THE TOWN OF GREENWICH"

(Appendix A-7). It is to the Charter that we must look to determine the power of the Town of Greenwich's Planning and Zoning Commission ("Commission") to establish particular substantive areas of subdivision regulation and therfore, the extent of Defendant's power to decide subdivision applications. 1

In Section 98, the Charter delineates the extent to which the Commission can regulate subdivisions incorporating many of the provisions of Conn. Gen. Stat. §8-25 which controls the subdivision of land and serves as the enabling subdivision legislation for the non-special act Connecticut communities (Appendix A-10). The Charter is the source of the authority of the Commission governing the allowable content of its regulations and subdivision process, except where there is a clear legislative intent that the general statute controls. Pissola vs. Planning and Zoning Commission Town of Plainville, 167 Conn. 202, 206, 355 A.2d 21,24 (1974).

In determining whether the Defendant is authorized to deny subdivisions for historical reasons, analysis of the Charter must determine that the Commission has the right to adopt regulations enabling it to do so.

---

1 Defendant acted as a planning commission in deciding Plaintiff's subdivision application after a de novo review pursuant to the special procedural authorization of Section 103 of its Charter, which provides that it will be bound to the same extent as the Commission by any subdivision regulations authorized by the Charter.

In this analysis, the same principles of

construction apply which govern construction of any statutue or municipal ordinance. Arminio vs. Butler, 183 Conn. 211, 217, 440 A.2d 757 (1981). Where words and phrases are clear and unambiguous, the courts will not read into enabling legislation by construction, provisions which are not clearly stated. Harlow vs. Planning & Zoning Commission of Westport, 194 Conn. 187, 193, 479 A.2d 808, 812 (1984); Dowling vs. Zoning Bd of Appeals of Old Lyme, 187 Conn. 689, 694, 447 A.2d 1172, 1174 (1982). The expressed enumeration of powers granted to municipalities excludes all other powers not expressly delegated to them other than those which follow by necessary implication. City Council of West Haven v. Hall, 180 Conn. 243, 250, 429 A.2d 481, 485 (1980). When ascertaining whether subdivision regulatory powers have been properly derived from the enabling legislation, it is well-established that the legislation be strictly construed;

> It has been said that the whole field of subdivision regulation is peculiarly a creature of legislation. It is therefore imperative that before subdivision regulations may be made operative, the necessary statutory authorization for such regulation must exist...in other words, in order to determine whether the regulation in question was within the authority of the Commission to enact, we do not search for a statutory prohibition against such enactment; rather we must search for statutory authority for the

enactment. ....Finn, Trustee vs. Planning and Zoning Commission of the Town of Seymour, 156, Conn. 540, 545, 244 A.2d 391, 393 (1968).

Section 101 of the Charter sets forth those areas of concern that Defendant's subdivision regulations are meant to control or regulate (Appendix A-11). There is no language in that section, or any other section of the Charter addressing subdivisions, that mentions the word "historic" either pertaining to historic concerns or historic districts. By contrast, there is specific language authorizing the Commission to regulate and make provisions for such matters as water, drainage, sewerage, flood control, street layout and grading, public utility services and the provision of parks and playgrounds. 2.

Defendant claims its authority for being able to regulate and decide subdivisions for historical considerations arises from the Charter's charge in Section 101(d) that subdivision "regulations provide that the land be of such character that it can be used for building purposes without danger to health or the public safety." (Defendant's Brief, pp. 14,15.) While this phrasing is broader and less defined than the other enunciated areas of regulatory concern, it is not so broad as to let the Commission regulate land use based on historic impacts. It is axiomatic that

---

2 Sections 101(d), (e) and (g) of the Charter.

> In order to determine whether the regulation in question was within the authority of the Commission to enact, we do not search for a statutory prohibition against such enactment; rather, we must search for statutory authorization for the enactment, and the delegation of authority to municipalities is narrowly construed. 3

There is nothing in Section 101(d) to alert the reader to the possibility that the Commission is authorized to consider the impact of a subdivision upon an historic area. "Health" describes the condition of being sound in body, mind or spirit, especially to be free from physical disease and pain. 4 It does not connote historical concerns. "Safety"is the condition of being safe from undergoing or causing hurt, injury or loss. 5 Both of these words relate to whether the subdivision preperty is physically "buildable" and not to whether it will impact more esoteric and subjective sensibilities dealing with

---

3 Simons vs. Canty, 195 Conn. at 530, 531, 488 A.2d at 1270, 1271; Avonside, Inc. vs. Zoning and Planning Commission of Town of 540, 545, 244 A.2d 391, 393 (1968).
Avon, 153 Conn. 232, 236, 215 A. 2d 409, 411 (1965); Finn, Trustee vs. PLanning and Zoning Commission of the Town of Seymour, 156 Conn. 540, 244 A.2d 391

4 Webster's Ninth New Collegiate Dictionary, Copyright 1984, pg 558.

5 ., pg. 1036.

aesthetic or historic concerns outside of the subdivision. 6 Nothing in the Charter ever mentions or implies in any way that historical concerns are meant to be considered in determing whether building on a particular piece of land is dangerous. The enabling language necessary for the Commission to create regulations allowing it to decide subdivisions on their historical impact is simply not to be found within the Charter.

Defendant posits further that other statutory authorities express a sufficiently strong historic preservation policy to support its denial of the subdivision for historical reasons (Defendant's Brief, pp. 15-19). Defendant looks to Conn. Gen. Stat. §7-147, §7-148(c)(8) and the Environmental Protection Act §22a-1a et seq but these statutes do not control the subdivision of land though they may be relevant for other administrative processes that may impact plaintiff's property.

---

6 This Court has rejected similar enabling language as support for the proposition that a subdivision may be denied for having "unbuildable" lots where those lots do not have safe and adequate access to an offsite town road. That language did not allow the planning commission to look beyond the character of the land "for building purposes". Reed vs. Planning and Zoning Commission, 208 Conn. 431, 435, 544 A.2d 1213 (1988)

B. Assuming, Arguendo, That Defendant Was Authorized By Its Charter To Promulgate Regulations Allowing Denial Of A Subdivision For Its Impact On Historic Preservation Goals, Defendant's Regulations Did Not Contain Known And Fixed Historical Review Standards To Guide It.

Assuming, arguendo, that Defendant was authorized by its Charter to deny a subdivision for its historic impact on the community, Defendant's regulations must, to be enforceable, contain known and fixed standards applying to all cases of like nature, and must conform to the principle that a regulation, like a statute, cannot be too general in its terms. Ghent v. Planning Commission of the City of Waterbury 219 Conn. 511, 594 A.2d 5 (1991). Defendant contends its denial for failure "to preserve the natural features of the landscape; i.e. the historic streetscape," and to protect the integrity, appearance and historic charcter of the historic district, is authorized by the broad "Purposes" language of section 6-260 (Defendant's Brief, pp. 8-9) of the Regulations. 7 The relevant portions of that section state that the subdivision regulations are meant to

---

7 References to Regulations are to Article 4, Subdivisions Greenwich Municipal Code (Appendix A-15).

- Further the orderly development of the Town in accordance with the Town Plan of Development. [§6-260(a)(1)]

- Control the layout of lots to protect the environment. [§6-260(a)(4)]

- Secure the preservation of natural features of the landscape and the setting aside of open space for the secreational needs of future residents. [§6-260 (a)(7)]

Nowhere are the words "historic," "historical streetscape," or "historic and architectural resources" even mentioned. 8 It is ludicrous to suggest that these regulations contain criteria reasonably precise and adequate to guide the Commission in deciding whether an application meets the requirements for historic preservation or should be denied.

C. Defendant's Reliance On The Plan of Development As A Source of Authority To Consider Historical Factors Is Misplaced.

Criteria for evaluating a subdivisions's compliance with the requirements of the regulations must be

---

8 These terms are used to cite the failings of the subdivision application in the reasons for denial given by Defendant in its decision (Appendix A-20).

sufficiently set forth in the regulations. Historical standards that may be in the Plan of Development ("Plan") have not been aset forth in the regulations. While a requirement that subdivisions comply with the applicable standards of the zoning regulations is both prescribed by the enabling statutes 9 and acceptable because the zoning regulations contain fixed and ascertainable standards for the physical

layout of a subdivision, the same cannot be said for a plan of development. The Plan by its very nature is a general, conceptual planning tool. The Charter acknowledges that the Plan is merely a recommendation for the most desirable use of land. (Appendix A-9).

Even if the Plan were deemed to contain fixed and ascertainable standards for historic and architectural resource preservation, they are not standards that may be incorporated into the regulations for the purpose of

---

9 Conn. Gen. Stat. §8-26.

10 Defendant erroneously contends this provision of the Charter is not a bar to using the Plan of Development to deny Plaintiff's subdivision. (Brief pp 21-22). It is illogical to interpret the prohibition as applying only where there is a potential for change from one type of zoning use to another. Subdivisions can only reflect current zoning conditions. The Charter prohibits using the Plan to block a different way of using the property for uses already allowed by zoning.

denying a subdivision application. The Charter in Section 98 specifically prohibits the Plan's provisions from preventing the use of land for a purpose that would otherwise be allowed, i.e. creating three residential lots from the subdivision land. 10 The sole exception permits the Commission to refuse subdivision approval for failure to conform with street and drainage systems within the Plan. (Appendix A-10).

D. The Regulations Use The Words Historic Or Historical In Only Two Provisions And These Provisions Are Not Relevant To This Application.

The regulations cited by Defendant which discuss historic factors, Section 6-266 (a)(19) and 6-266(a) (20), have no relevance to the issue before the court and do not support Defendant's claim. These sections which call for an evaluation of historical and archeological factors apply only when the Commission, or Defendant, request that an environmental assessment be performed, and no such request was made (Defendant's Brief, p. 13). Because an Environmental Assessment was never requested, Section 6-296 (d), the only other regulation to mention the word "historic," also never became relevant. That Section specifically, though it is not conceded validly, permits the Defendant to require a redesign or larger lots only where an Environmental Assessment indicated a need to do so to protect environmental or historic resources. Even then, there are no known standards to reasonably let the Commission and public know of the circumstances under which historic

factors will permit such a redesign. Ghent vs Planning Commission, supra at 518.

Plaintiff's application met all applicable subdivision regulations and should have been approved. "The planning commission, acting in its administrative capacity herein, has no discretion or choice but to approve a subdivision if it conforms to the regulations adopted for its guidance." Reed vs. Planning and Zoning Commission, supra 433.

II. CONCLUSION

While some leeway as to the content of subdivision regulations is appropriately given to planning commissions, it is well-settled that those commissions are not given any authority to go beyond their enabling legislation. To allow subdivision review based on historic factors where not specifically authorized will open the door to ever-increasing speculative and subjective reviews depriving applicants of the right to know the physical subdivision standards upon which their application will be judged. After all, subdivision regulations exist so as to ensure development consistent with the physical, but authentic features of the land. The Appellate Court correctly noted that the state and the Town of Greenwich have undertaken to regulate for historic concerns pursuant to Conn. Gen. Stat. §7-147 and it is through that specific enabling legislation that historic concerns should be addressed.

For all of the foregoing reasons, amicus curiae urge this Court to affirm the decision of the Appellate Court.

Respectfully submitted,

THE PLAINTIFF

signed Robin Messier Pearson, Esq.
Chairperson, Planning & Zoning Law Section of the Connecticut Bar Association
LEVY & DRONEY, P.C.
74 Batterson Park Road
Farmington, Connecticut 06032

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, on this 9th day of June, 1993 to

Joyce H. Young, Esq.
Assistant Town Attorney
Law Department
Town Hall
Greenwich, Ct 06836-2540

E. Don Smith
Eileen Smith, pro ses
35 Strickland Road
Cos Cob, Ct 06807

William E. Haggerty, Esp.
511 Indian Field Road
Greenwich, Ct 06830

Signed, Robin Messier Pearson

APPENDIX

ITEM

Excerpts from Special Act 459

Excerpt from Special Act Creating Charter for Town of Greenwich

Excerpts from the Charter, Greenwich Municipal Code

Excerpts from Greenwich Municipat Code Article 4 - Subdivisions

Letter of Denial from Defendant Planning and Zoning Board of Appeals may 15, 1989

E. DON SMITH ET AL. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH
(10431)

DALY, NORCOTT and LAVERY, Js.

The plaintiffs appealed to the trial court from a decision by the defendant zoning board of appeals of the town of Greenwich denying their application for approval to subdivide certain of their real property. The trial court, concluding that the board's consideration of historical factors was appropriate and that the record supported the board's decision, rendered judgment upholding the decision of the board, and the plaintiffs, on the granting of certification, appealed to this court. *Held* that the trial court incorrectly upheld the board's denial of the plaintiffs' application; the statutes (§§ 8-25 and 8-26) setting forth substantive and procedural subdivision requirements do not authorize the inclusion of historical factors, the reasons given by the board for the denial were not based on known and fixed standards, the Greenwich town charter specifically provides that the plan of development cannot prevent the use of land that is otherwise lawful, and it is the duty of the historic district commission, not the planning and zoning commission or the zoning board of appeals, to decide whether a building should be erected in an historic district.

Argued May 1—decision released September 8, 1992

Appeal from the decision by the defendant denying the plaintiffs' application for subdivision approval, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Cioffi, J.*,

granted the motion filed by the Historical Society of the Town of Greenwich, Inc., et al., to be made defendants; thereafter, the matter was tried to the court, *Ryan, J.;* judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

E. Don Smith, pro se, and *Eileen Smith,* pro se, the appellants (plaintiffs).

James W. Macauley, for the appellee (named defendant).

William E. Hegarty, for the appellees (defendant the Historical Society of the Town of Greenwich, Inc., et al.).

LAVERY, J. The plaintiffs, E. Don Smith and Eileen Smith, appeal from the trial court's decision affirming the denial of their subdivision application by the zoning board of appeals of the town of Greenwich.

The dispositive issue in this appeal is whether the trial court correctly upheld the denial of the plaintiffs' subdivision application. The trial court found that the application conformed to all the stated subdivision regulations, but that it "did not meet the purposes of the subdivision regulations . . . . It does not conform to the town of Greenwich plan of development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape: namely the historic streetscape." We reverse the judgment of the trial court.

The relevant facts are as follows. The plaintiffs reside at and are owners of property located at 35 Strickland Road in Greenwich. The property is located in an R-7 zone and contains 33,032 square feet. The minimum lot size for this zone is 7500 square feet. The property

is also located in an historic district. In January, 1987, the plaintiffs submitted a subdivision application to the planning and zoning commission of the town of Greenwich (commission), seeking to subdivide the property into three lots. In April, 1987, the commission conducted a hearing on the plaintiffs' application and advised them to proceed to a final subdivision plan, subject to the resolution of a number of specified issues prior to the final application submission.[1]

The plaintiffs subsequently proposed a final subdivision plan. On November 22, 1988, the commission denied the subdivision application by the following resolution: "WHEREAS, the Town of Greenwich Plan of Development, 1984 states as a basic development objective the preservation of historic and architectural resources; and

[1] In particular, the commission requested the following:

"1. That Lot 1 be shifted to the southerly property boundary of the tract. Concurrently that portion of the park and playground area displaced by the relocation of Lot 1 shall be moved to the northerly property line of Lot 1.

"2. The commission observed that the area reserved for park and playground being 14.67 percent, conventionally required to be 15 percent, is acceptable as it is calculated from a gross area which includes a free-throw lot for which park and playground is not required.

"3. The utility easement shall be located so as to minimize impacts to significant trees.

"4. The applicant shall meet with the Historic District Commission in order to determine an appropriate house location for Lot 1. The preservation of significant trees shall be taken into consideration in determining house location, as well as conformity as nearby as possible to the existing setback/streetscape of house locations to the south.

"5. The applicant shall meet with the Conservation Coordinator in order to develop tree preservation details as required by house and utility easement siting.

"6. That the Declaration of Restrictions for the reserved areas be submitted to the Law Department in accordance with the model document.

"7. That provisions of access easements be indicated on the record sheet.

"8. That the existing southerly curbcut be the sole accessway to Lot 1.

"9. That the appropriate utility easements to the northerly property (Ward) be indicated on the record sheet.

"10. That a sight line improvement plan indicating any modifications to existing features of walls and trees, etc., be submitted for review and

"WHEREAS, the subject lot is contained within the duly established Mill Pond Historic District, and

"WHEREAS, the Commission recognizes that the existing streetscape, which is defined by the open space of the subject tract in relation to adjoining historical properties, structures, and open spaces is a significant element of the historic district in terms of visual appearance as well as historic use and occupancy of the land; and

"WHEREAS the subdivision would permit construction of a house in the previously defined, significant open space, thereby disrupting an essential characteristic of the historic district; and

"WHEREAS a stated purpose of the Subdivision Regulations of the Town is to 'Further the orderly development of the Town in accordance with the Town Plan of Development'; and

"WHEREAS, the Commission finds that there are other zoning options for development of the property which would provide for the same or greater number

approval by the Department of Public Works. Historic District Commission should also comment on alternate plans to achieve acceptable sight distance, if significant trees or the stone wall are adversely effected.

"11. The applicant must obtain a sewer permit prior to the issuance of a building permit.

"12. The applicant shall obtain confirmation from the Engineering Division that there will be no adverse impacts to nearby properties and water bodies due to site drainage.

"13. The following note is to appear on the construction sheet: 'Prior to any excavation(s) the applicant(s), in accordance with Public Act 77-350, shall be required to contact Call Before You Dig, Inc., at 1-800-922-4455 for markout of underground utilities.'

"14. Submit a driveway plan in accordance with Sec. 6-131 [of the Greenwich Municipal Code]. In the event significant open space or trees are impacted, it is recommended that the applicant apply for a variance in order to use as much of the existing driveway as possible while providing safe sight distance and maneuverability. The plan should be reviewed with Planning Staff, HDC and D.P.W. prior to submitting final plan."

of dwelling units while preserving the site's open space and natural features which are significant components of the historic streetscape;

"THEREFORE, BE IT RESOLVED that final Subdivision #1066 of E. Don Smith and Eileen Smith owners of property located on Strickland Road consisting of a record sheet prepared by J. A. Kirby Company dated March 17, 1988, revised September 26, 1988, is hereby denied."

The plaintiffs appealed the decision of the commission to the defendant zoning board of appeals of the town of Greenwich (board). The board then conducted a de novo public hearing on the plaintiffs' final subdivision plan pursuant to § 103 of the Greenwich Municipal Code. The proposed subdivision called for three lots, the first containing the plaintiffs' residence, the second containing the plaintiffs' barn, and the third the presently unimproved area in front of the plaintiffs' residence. At the public hearing, the chairman of the historic district commission urged the board of appeals to reject the subdivision, stating that the historic district commission would not allow any structure to be built on the third lot. After a lengthy hearing, the board denied the plaintiffs' appeal on the following grounds: "The proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260, thereof. It does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape; namely, the historic streetscape.

"Applicants' plan proposed in an Historic District was opposed in testimony and in writing by the Historic District Commission which among other things, oversees erection and alteration of buildings in said district. Such

plan was also opposed by residents in the District. The Board finds that the integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired by this plan. The residents who voted to form an Historic District were given assurances of preservation of their historic neighborhood even though they knew certain freedoms of future development would be regulated and restricted.

"The applicants were aware of the property's location in the Historic District since that fact is stated in their deed and they formerly resided in this District at another address. The Board concluded that the applicants' development rights were not deprived because other alternatives for development are available.

"The property is located in the Coastal Zone of the Town. Therefore, it is subject to the requirements of the *Coastal Area Management Act.* The Board finds that the proposed subdivision plan would have an adverse impact on coastal resources because of the alteration of *natural features of vistas.*" (Emphasis in original.)

The plaintiffs appealed the board's decision to the Superior Court, pursuant to General Statutes § 8-8 (2) (b). The trial court upheld the board's decision, ruling against the plaintiffs' claims that the proposal met the requirements of the subdivision regulations as written and that the town plan of development is not a regulation. The trial court further found, however, that the board's conclusion, based on the Coastal Area Management Act, was not based on substantial evidence and was not a sufficient reason to deny the subdivision application.

The court found in relevant part as follows. "Section 6-260 of the Greenwich Municipal Code provides that one of the purposes of the subdivision regulations is

to 'further the orderly development of the town in accordance with the town plan of development.' The town plan of development has as one of its 'Basic Objectives' the preservation of historic resources. The town plan of development also provides that 'Greenwich has a rich . . . historical heritage that should be protected for the benefit and enlightenment of future generations,' and that 'conserving the Town's . . . historical resources is a notably effective land use tool for preserving the essential character and spirit of the community.' Other references to the importance of historic factors appear in the town plan of development. An evaluation of historical factors is specifically mentioned in the Greenwich Subdivision Regulations, § 6-266 (a) 19, governing subdivisions in the coastal zone.

"It is the opinion of the court that the plaintiffs' position is without merit. Not only do the subdivision regulations mention historic factors, but they state as a purpose the development of the town in accordance with the town plan of development, which has preservation of historic resources as a basic objective. Further, given the established public policy favoring historic preservation, see General Statutes § 7-147a et seq. and Greenwich Municipal Code § 6-307, and the plaintiffs' deed restriction, it is found that the board did apply standards contained in the regulations to the subdivision, and plaintiffs had notice that historic factors would be considered.

"The board's finding that the proposal would impair the historic streetscape is supported by the record. The Smiths' side of Strickland Road is characterized by homes on lots with sweeping front lawns. The plaintiffs plan to convert their front lawn into a building lot and construct thereon a house with a thirty feet by forty feet footprint, and setbacks of twenty-five feet from the front properly line, twenty feet from the south property line, and fifteen feet from a line of trees. These

exhibits show that construction of a house on the front lawn would drastically alter the streetscape, and support the board's conclusion in that regard.

"The board also cited the opposition of the historic district commission, which, among other things, oversees erection and alteration of buildings in the historic district."

The trial court ultimately concluded that the board's consideration of and decision based on historic factors was proper and that the evidence on the record was sufficient to support the board's decision that the proposed subdivision would impair the appearance of the historic streetscape. The plaintiffs appealed from the trial court's dismissal of their appeal after we granted certification.

We disagree with the trial court for the following reasons: (1) the enabling statutes on subdivisions did not give the defendant the authority to include historical factors in its regulations; (2) the terms "town plan of development," "historic factors" and "historic streetscape" are not known and fixed standards required for subdivision regulations; (3) the Greenwich town charter forbids the board from denying a subdivision application based on the plan of development; and (4) it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district.

" 'It has been said that the whole field of subdivision regulation is peculiarly a creature of legislation. It is therefore imperative that before subdivision regulations may be made operative, the necessary statutory authorization for such regulation must exist. . . . In other words, in order to determine whether the regulation in question was within the authority of the commission to enact, we do not search for a statutory prohibition

against such an enactment; rather, we must search for statutory authority for the enactment.' . . . " (Citations omitted.) *Finn* v. *Planning & Zoning Commission*, 156 Conn. 540, 545, 244 A.2d 319 (1968).

Substantive subdivision requirements are set forth in General Statutes § 8-25 and procedural subdivision requirements are set forth in General Statutes § 8-26.[2] The subdivision regulations are required to conform to local zoning regulations. Subdivision regulations cannot impose minimum lot size, shape, width and depth requirements greater than those required under the zoning regulations for the zone where the property is to be subdivided or deny approval of lots that meet all zoning requirements. *Christofaro* v. *Burlington*, 217 Conn. 103, 107, 584 A.2d 1168 (1991). Also, subdivision regulations can have provisions to meet the general test in § 8-25 that the land to be subdivided shall be of such character "that it can be used for building purposes without danger to health or the public safety."[3] Further, the definition of subdivision in the regulations must conform with the definitions of subdivision and resubdivision set forth in General Statutes

[2] General Statutes § 8-25 provides in part: "Such regulations shall provide that the land to be subdivided shall be of such character that it can be used for building purposes without danger to health or the public safety that proper provision shall be made for water, drainage and sewerage and . . . that the proposed streets are in harmony with existing or proposed principal thoroughfares shown in the plan of development as described in section 8-23, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width, as to provide an adequate and convenient system for present and prospective traffic needs. . . ." Section 8-25 also permits regulation of street grades and the extent of improvement of subdivision roads, open spaces, parks and playgrounds, soil erosion and sediment controls, the provision of public utilities and services, and energy efficient patterns of development and use.

[3] These regulations can include requirements for an application form with required information on it, a proposed subdivision map, a topographic map, a soil suitability report for septic systems on the proposed lots, engineer drawings for proposed roads and/or drainage facilities, and a map showing inland wetland area boundaries.

§ 8-18. *Peninsula Corporation* v. *Planning & Zoning Commission*, 151 Conn. 450, 451, 199 A.2d 1 (1964).

The enabling statutes do not allow a planning or planning and zoning commission to promulgate subdivision regulations based on historic and architectural concerns, historic streetscape or the integrity and historic character of a historic district. The parties stipulated, and our review of the regulations confirms, that the application conformed to all of the regulations of an R-7 zone. At oral argument, the board's counsel conceded that if the subject property was not located in an historic district, but in another R-7 zone, the application would have been approved because it met all of the regulations not concerned with "historic." The reliance by the board in a subdivision application on matters "historic" is outside the enabling statute and is void.

"When a municipal planning commission considers the approval or disapproval of a subdivision plan, it is acting in an administrative capacity rather than in a legislative capacity. *Reed* v. *Planning & Zoning Commission*, 208 Conn. 431, 433, 544 A.2d 1213 (1988). 'The planning commission, acting in its administrative capacity herein, has no discretion or choice but to approve a subdivision if it conforms to the regulations adopted for its guidance.' Id.

" ' "The designation of a particular use of property as a permitted use establishes a *conclusive presumption* that such use does not adversely affect the district and *precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district.*" ' (Emphasis added.) *TLC Development, Inc.* v. *Planning & Zoning Commission*, 215 Conn. 527, 532-33, 577 A.2d 288 (1990)." *Sowin Associates* v. *Planning & Zoning Commission*, 23 Conn. App. 370, 374, 580 A.2d 91 (1990).

"Subdivision regulations cannot be too general in their terms and must contain known and fixed standards that apply to all similar cases. *Sonn* v. *Planning Commission*, 172 Conn. 156, 159–60, 374 A.2d 159 (1976). A commission's regulations must be reasonably precise in subject matter and reasonably adequate and sufficient to give both the commission and those affected by its decision notice of their rights and obligations. *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 105, 67 S. Ct. 133, 91 L. Ed. 103 (1946); see *Sonn* v. *Planning Commission*, supra, 159.

"General policy statements gleaned from subdivision regulations regarding compliance with public health and safety regulations do not provide a sufficient basis for rejection of a subdivision permit. *TLC Development, Inc.* v. *Planning & Zoning Commission*, supra, 530 n.2. Furthermore, the conclusive presumption set forth in *TLC Development, Inc.*, precludes a commission's reliance on a proposed subdivision's failure to coincide with the general harmony of the district. Id., 533." *Sowin Associates* v. *Planning & Zoning Commission*, supra, 376.

In the present case, the reasons given by the board for the denial of the subdivision application, even if "historic," was part of the enabling act, were not based on fixed and known standards that could apply to all similar subdivisions. At best they were general policy statements.

The board made the following findings that demonstrate this point. First, "[t]he proposed subdivision did not meet the purposes of the subdivision regulations as provided in Sec. 6-260 thereof."[4] This is a general

[4] "[Greenwich Municipal Code Subdivision Regulations] Sec. 6-260. Purposes of Article.

(a) The purposes of this Article shall be to:

policy statement. Section 6-260 of the Greenwich municipal code subdivision regulations sets forth general purpose statements, no standards and does not mention the words "historic" and "historic streetscape." They are not mentioned in this section or any other section of the subdivision regulations.[5]

Second, "[the proposed subdivision] does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objections of preservation of historic and architectural resources." This is a general purpose statement without any fixed and known standards. In addition, § 98 of the Greenwich town charter specifically provides that the commission shall not refuse approval of any subdivision on the ground that such subdivision creates or will tend to create a use of land contrary to that shown on the plan of development.[6]

(1) Further the orderly development of the Town in accordance with the Town Plan of Development.

(2) Insure that any land subdivided can be used for building purposes without danger to health or public safety. (3/9/81)

(3) Regulate the layout of streets in accordance with sound engineering principle to further the orderly development of the existing and projected street systems of the Town.

(4) Control the layout of lots to protect the environment.

(5) Regulate the layout, design and construction of drains along natural drainage routes and watercourses to further the orderly and efficient development of the drainage system of the Town.

(6) Provide for protective control measures in areas subject to flooding.

(7) Secure the preservation of natural features of the landscape and the setting aside of open space for the recreational needs of future residents.

(8) Control the placement of utilities."

[5] See footnote 8, infra.

[6] "[Greenwich Town Charter] Sec. 98. Plan; limitation on effect.

"(a) The Plan of Development shall not, except as specifically provided in this Article, prevent the use of any land for any purpose otherwise lawful, and shall not in any way reduce the amount of the award which any landowner may be entitled to receive for his land in any condemnation proceedings, whether or not the landowner or his predecessors in title shall have improved or altered his land contrary to the Plan of Development.

"(b) The Commission shall not refuse approval of any subdivision on the ground that such subdivision creates or will tend to create a use of land

Third, "[the proposed subdivision] does not preserve the natural features of the landscape; namely, the Historic streetscape." There is neither a general nor a specific definition of "historic streetscape" in the regulations, let alone a known or fixed standard.

Finally, the board found that "the integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired by this plan." There is nothing in the subdivision regulations that has anything to do with the historic district. The land in question is located in an R-7 zone, and the plaintiffs' subdivision application in every way conforms to the zoning and subdivision requirements of the R-7 zone.

Our disagreement with both the board and the trial court is the confusion of the planning and zoning commission's duties and functions as to subdivision regulations and applications with the historic district commission's duties as an administrative board to hear and decide applications for certificates of appropriateness as set forth in General Statutes § 7-147d.[7] As

contrary to that shown upon the Plan of Development, except insofar as the Commission may, under Section 101, require the streets and drains in such subdivision to conform to the street and drainage system shown on the Plan of Development."

[7] "[General Statutes] Sec. 7-147d. CERTIFICATE OF APPROPRIATENESS: PARKING AREAS. (a) No building or structure shall be erected or altered within an historic district until after an application for a certificate of appropriateness as to exterior architectural features has been submitted to the historic district commission and approved by said commission.

"(b) No building permit for erection of a building or structure or for alteration of an exterior architectural feature within an historic district and no demolition permit for demolition or removal of a building or structure within an historic district shall be issued by a municipality or any department, agency or official thereof until a certificate of appropriateness has been issued. A certificate of appropriateness shall be required whether or not a building permit is required.

"(c) The historic district commission may request such plans, elevations, specifications, material and other information, including in the case of demolition or removal, a statement of the proposed condition and appearance

Professor Tondro states, "[t]he historic district commission's regulatory tool is the certificate of appropriateness. No building can be erected or altered within the district until the commission has issued a certificate. The municipality may not issue a building or demolition permit for any structure until a certificate has first been granted by the commission. Even outdoor advertising signs and bill posters need a certificate. Nor may any area within the district be used for parking, other than residential, without a certificate from the commission (Section 7-147d)." T. Tondro, Connecticut Land Use Regulation (1983 Sup.) p. 80.

The plaintiffs met all the requirements of the subdivision regulation of the town of Greenwich.[8] Because the property is located in an historic district, the plaintiffs must obtain a certificate of appropriateness from the historic district commission before they may build

of property after such demolition or removal, as may be reasonably deemed necessary by the commission to enable it to make a determination on the application. The style, material, size and location of outdoor advertising signs and bill posters within an historic district shall also be under the control of such commission. The provisions of this section shall not be construed to extend to the color of paint used on the exterior of any building or structure.

"(d) No area within an historic district shall be used for industrial, commercial, business, home industry or occupational parking, whether or not such area is zoned for such use, until after an application for a certificate of appropriateness as to parking has been submitted to the commission and approved by said commission. The provisions of this section shall apply to the enlargement or alteration of any such parking area in existence on October 1, 1973."

[8] We note that the trial court incorrectly relied on § 6-266 (a) (19) of the Greenwich municipal code subdivision regulations. That section addresses environmental concerns in the context of the preliminary layout, and provides in relevant part:

"PRELIMINARY LAYOUT CONTENTS.

(a) . . . The preliminary layout shall include as many of the following items of information as is practicable.

• • •

(19) For a subdivision of ten (10) lots or more or the subdivision of ten (10) or more acres, an environmental assessment by qualified environmen-

in accordance with their subdivision plan. The plaintiffs are entitled to a fair hearing on their application before a neutral and unbiased historic district commission.

The judgment is reversed and the case is remanded with direction to render judgment sustaining the appeal and ordering the granting of the subdivision application.

In this opinion the other judges concurred.

---

tal specialists shall be provided. The Commission may require said assessment for smaller subdivisions if deemed necessary. The assessment shall include an evaluation of the following: (3/9/81)

(a) Conformance with Open Space Plan of Development

(b) Significant wetlands

(c) Steep Slopes

(d) Stormwater Drainage

(e) Soils capabilities

(f) Vegetation including forested areas and the identification of trees over 10" in caliper when not in part of forested areas.

(g) Significant geological formations

(h) Historical and archaelogical factors

(i) Animal habitats

(j) Water availability and quality

(k) Aquifer protection in accordance with the Statutes of the State of Connecticut

(l) Other data which the Commission deems appropriate

The environmental assessment shall be subject to a review, after the receipt of recommendations of the Conservation Commission, by the Planning and Zoning Commission including the mitigation measures for minimizing environmental impact before the applicant proceeds to final plan."

D.N.CV0101333 S

SUPERIOR COURT
STAMFORD / NORWALK
JUDICIAL DISTRICT
AT STAMFORD

E.DON SMITH & EILEEN SMITH
V
ZONING BOARD OF APPEALS OF THE
TOWN OF GREENWICH

APRIL 10, 1991

MEMORANDUM OF DECISION

This is an appeal from a decision of the Greenwich Planning and Zoning Board of Appeals denying an application to subdivide property in an historic district. The Plaintiffs are E.Don Smith and Eileen Smith, the owners of the subject property.

In early 1987 the plaintiffs applied to the Greenwich Planning and Zoning Commission (hereinafter "Commissioner") for approval to subdivide their property into three lots. The Commission considered the proposal, and advised the Smiths to proceed to final subdivision plan subject to fourteen conditions being resolved prior to final submission. (Return of Record #4 page S). In September of 1988 the Smiths submitted their final subdivision plan to the Commission (Return of Record #4, page P) which the COmmission resolved to deny after considering it at a meeting held in November of 1988.

Pursuant to section 103(a) of the Greenwich Charter (Return of Record

#8(b)(6), the plaintiffs appealed the Commission's decision to the Greenwich Planning and Zoning Board of Appeals (hereinafter "Board"). (Return of record #1). Public hearings on the subdivision plan were held on April 19 and May 3, 1989, at which the Board reviewed the proposal de novo, pursuant to Sec. 103(a) of the Greenwich Charter. (Return of Record #s 6,7,8-0,9,10,11,12). Notice of these hearings was published in the Greenwich Time on April 7,12, and 28, 1989. (Return of Record #s 6 and 11). On May 15, 1989 the Board denied the Smiths' proposal (Return of Record # 14); notice of the decision was mailed to them on May 16 (Return of Record # 15) and was published in the Greenwich Time on May 17, (Return of Record #16).

Pursuant to Section 104 of the Greenwich Charter and Section 8-28 of the Connecticut General Statutes, the Smiths' brought this appeal to superior court. The appeal was commenced on May 31, 1989 by service on the defendant Board through iits authorized officers (see Sheriff's Return of Service) and the complaint was filed with the court on June 6, 1989. The Historical Society of the Town of Greewich and Anita deLesseps Keefe were made parties-defendat to this appeal in September, 1989, and the complaint was amended subsequent therto. All defendants have answered the complaint, and all parties have filed memoranda of law. The record was returned to court on August 31, 1989 except for several large exhibits, which were returned on October 24, 1990, the date the appeal was heard by the court. The Court finds the appeal is timely, and there are no procedural

grounds for sustaining or dismissing this appeal.

This appeal involves a proposed subdivision in the Mill Pond Historic District in the Town of Greenwich. The historic district was established in 1975 pursuant to Conn. Gen Stat. Sec. 7-147 et. seq. (Return of Record #8p). A study committee appointed by the Representative Town Meeting conducted an extensive study of the Strickland Road area of Cos Cob, including meetings with owners of real property expected to be included in the District, and an on-site inspection by a staff member of the Connecticut Historical Commission (Return of Record # 8p). The study committee recommended creating an historic district in the Strickland Road area, and the committee's report was approved by both the Connecticut Historical Commission and the Town Planning and Zoning Commission. (Return of Record #8p). The committee held a public hearing on the proposed district, at which all but one of the owners of real property in the district were represented. Among the reasons given by the committee for recommending creation of the district were its considerable cultural and historic significance; the fact that the area "constitutes a group of houses, in a compatible setting, which, taken as whole, visually expresses modes of living representative of the early American and Victorian periods". and the facts that the houses in the area had retained a high degree of integrity and no visual or other intrusions compromised the area's character. (Return of Record #8p).

The Representative Town Meeting

adopted the ordinance creating the historic district in December of 1975. (Return of Record # 13(u)(3)). The original district consisted of Fourteen properties, including that now owned by the plaintiffs ((Return of Record #8q). Seventy-six percent of the affected property owners approved creation of the district. (Return of Record #13dd). In 1978 the district was enlarged, after a vote by the residents, to include the eleven properties in Mill Pond Court (Return of Record # 13u). The plaintiffs at that time owned property at One Mill Pond Court. (Return of Record #13u).

In 1984 plaintiffs purchased the subject property (Return of Record #8(b)7), and, based on their previous ownership of property within the historic district, it can be inferred that they knew the subject property was within the district. In addition, the deed to plaintiffs' property contains the following language:

> Said premises are conveyed subject to...[r]egulations imposed by reason of the fact that the premises are part of a historic district as established by the Town of Greenwich....

(Return of Record #8(b)7). Plaintiffs' property is situated in the heart of the historic district (Return of Record #8q) and consists of a 33,032 square foot parcel of land which contains one residential dwelling and a two story detached barn. (Return of Record #4). The portion of Strickland Road in which the subject property is situated is characterized by sweeping front lawns. (Return of Record #s 8(e) & (y).

The subdivision plan denied by the

Board proposes dividing the property into three lots, each in excess of 7500 square feet (Return of Record # 4p-10) with over 4800 square feet reserved for parks and recreation purposes. (Return of Record #4 P-1). The proposed lot one is currently open space comprising plaintiffs' front lawn. (Return of Record # 2). Plaintiffs' plan contemplates converting the barn into a dwelling on lot three, and constructing a new dwelling on lot one. The current dwelling would remain on lot two. (Return of Record # 4 p-1).

Subdivision approval in Greenwich generally involves a two-step procedure in which an applicant submits a preliminary plan to the Commission, which generally recommends that the applicant proceed to final plan. (Return of Record # 12, pages 88-90). In this case, the Commission studied the Smith's preliminary subdivision plan and advised the Smiths to proceed to final plan subject to the resolution of fourteen points prior to final submission. (Return of Record # 4-s). Among these points were the requirements that plaintiffs meet with Historic District Commission to determine an appropriate house location for Lot 1, and apply for a variance relative to the driveway. (Return of Record #4-s). Although plaintiffs met with the HDC it was unable to take a position on house location. (Return of Record # 4-R). Plaintiffs' application for a variance for the driveway was denied by the Planning the Zoning Board of Appeals. (Return of Record # 4-h).

Plaintiffs' proposal was opposed before both the Commission and the Board. (Return of Record #s 4-E, 4-D,

13--U, 13-V, 13-W, 13-Z, 13-aa, 13-bb, 13-bbb' #12 at pp 25-47, 50-53, 53-57, 57-69, 76-81,82). This opposition was based on the belief that the proposed subdivision was inconsistent with, and would adversely affect, the Historic District. (Id.) Tweny-three owners of property in the district, as well as the Historical Society, opposed the application. (Return of Record #s 13v and 13aa). The Historic District Commission provided the bulk of the evidence in opposition, and recommended against approval.

The plaintiffs' property is also located in the Coastal Zone as defined by the Connecticut Coastal Area Management Act. See Conn. Gen. Stat. $22a-94. Due to this fact, the subdivision was subject to review under state and local regulations as a coastal subdivision plan. See Sec. 6-266 of the Greenwich Municipal Code. At the hearing before the Board, the Commission presented testimony that the plaintiffs 'plan would negatively impact the natural vistas or viewpoints (Return of Record # 7 at pp 73-77). The plaintiffs submitted photographs and a diagram showing sight lines from their side of Strickland Road to Mill Pond. (Return of Record #8J). These photographs show that between Mill Pond and plaintiffs' side of Strickland Road lie the road itself and a row of houses. (Return of Record # 8J). The Commission's decision denying the subdivision plan did not contain any reasons based on the location of the property in the coastal zone.
(Return of Record # 4).

The board's decision to deny

subdivision approval stated the following reasons:

1. The proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260, thereof. It does not conform to the Town of Greenwich Plan of Developoment in that it does not meet the basic objectives of preservation of historic and architectural resources. Further-more, it does not preserve the natural features of the landscape; namely, the historic streetscape.

2. Applicants' plan proposed in an Historic District was opposed in testimony and in writing by the Historic District Commission which among other things, oversees erection and alteration of buildings in said district. Such plan was also opposed by residents in the District. The Board finds that the integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired by this plan. The residents who voted to form an Historic District were given assurances of preservation of their historic neighborhood even though they knew certain freedoms of future development would be regulated and restricted.

3. The applicants were aware of the property's location in the Historic District since that fact is stated in their deed and they formerly resided in this District at another address. The Board concluded that the applicants' development rights were not deprived because other alternatives for development are available.

4. The property is located in the Coastal Zone of the Town. Therefore, it is subject to the requirements of the Coastal Area Management Act. The Board finds that the proposed subdivision plan would have an adverse impact on coastal resources because of the alteration of natural features of vistas.

In conducting a de novo review of plaintiffs' proposal the Board acted pursuant to section 103(a) of the Greenwich Charter which provides:

(a) The action of the Commission in approving or disapproving any subdivision may be reviewed by the Planning and Zoning Board of Appeals on petition by any Town agency. The Board of Education or the Housing Authority, by any person owning property in the Town, or by the person seeking approval of such subdivision, provided written notice of such petition is filed by the petitioner with the Commission and the Town CLerk within twenty days from the effective date of such action. Upon receipt of such written notice, the Commission shall transmit a record of the proceedings had before it to the Planning and Zoning Board of Appeals which after a public hearing had de novo shall have the power to uphold or reverse such action...

(c) The action of the Planning and Zoning Board of Appeals on a petition for review of a decision by the Planning and Zoning Commission shall constitute the action of the final planning authority of the Town with respect to

subdivisions.

Because such review was de novo, the Board acted as a planning commission whose review of subdivisions is authorized by Conn. Gen. Stat. Sec. 8-25 and Sec. 8-26.

The plaintiffs have brought this appeal of the Board's decision under Conn. Gen. Stat. Sec 8-28, which provides that "any person aggrieved by an official action or decision of a planning commission...may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court..." An appeal from the decision of an administrative agency may only be taken advantage of by strict compliance with the statute creating the right to appeal. Simko v. Zoning Board of Appeals, 206 Conn. 374, 377 (1988). Because the statutory provisions are mandatory and jurisdictional, failure to comply subjects the appeal to dismissal. Id. Aggrievement is a pre-requisite to maintaining an appeal. Smith v. Planning and Zoning Board, 203 Conn. 317, 321,371 (1987).

At the hearing before the court on October 24, 1990 Mr. Smith testified that he and his wife are the owners of the subject property. Record Item 7 is a copy of the deed conveying the property at 35 Strickland Road to the Smiths from Richard Cromwell, III, and Record Item 8 is a copy of the deed conveying an appurtenant strip of land to the Smiths from Duira B. Ward. It is found that based on the evidence in the record and the testimony of Mr. Smith, the plaintiffs are aggrieved and

entitled to maintain this appeal.

In reviewing the Board's decision, the court is not at liberty to substitute its judgment for that of the Board. Frito-Lay, Inc, v P & Z 206 Conn. 554, 572-3 (1988). The Court is only to determine whether the agency has acted illegally, arbitrarily, or in abuse of its discretion, Id. at 573 and whether the record reasonably supports the conclusions reached by the agency. Burnham v. PZC, 189 Conn., 261, 265 (1988); Stankiewicz v. ZBA, 15 Conn. App. 729 (1988), aff'd., 211 Conn. 78 (1989).

The Board acted in its administrative capacity when it reviewed plaintiffs' subdivision plan. See Reed v PZC, 208 Conn. 431, 433 (1988). In such capacity the Board had no discretion to deny the plan if it conformed to the subdivision regulations. Id. If the plan did not conform to the regulations, it could be disapproved. Id. On the appeal the plaintiffs have the burden of proving that the Board's dicision was erroneous. Burham v PZC 189 Conn. 261, 266 (1983).

The plaintiffs raise several claims of error by the Board. First, they claim that their subdivision proposal conformed to the regulations, therefore the board could not deny it. The plaintiffs argue that the Greenwich Municipal Code and subdivision regulations do not set forth precise, adequate or sufficient regulations to govern subdivisions in an historic district, such that an applicant is on notice that review of the plan will include a determination of its impact on the historic district. The Board rejected this claim, finding that

plaintiffs' proposal did not meet the basic objective of the Town Plan of Development to preserve historic resources. Because one of the purposes of the subdivision regulations is the development of the Town in accordance with the Town Plan of Development, the Board contends that protection of the historic district obviously will be concern when a subdivision plan in the district is being reviewed. The Board also rejected plaintiffs' claim that the regulations are imprecise, stating "the subdivision regulation referring to the plan of development [Section 6-260] should be sufficient to alert any reasonable person to examine the plan in this regard."

Plaintiffs next claim that the denial of their plan constitutes a taking of property without due process of law. The Board rejected this claim, concluding that because other alternatives for development of the property exist, the plaintiffs were not deprived of their development rights. The defendant Board argues that plaintiffs have failed to establish a diminution in the value of their property as a result of the decision, and further, only one proposal has been rejected, not all proposals.

Next, plaintiffs claim that the Board's conclusion that the subdivision would impair coastal views in erroneous, and that construction on other properties in the coastal zone has been allowed. They also contend that their proposal to construct a conforming single-family residential structure is exempt from coastal site plan review under section 6-111(c)A of the Greenwich Municipal Code, which allows exemptions

for such construction beyond one hundred feet of the mean high tide line. This claim was also rejected, the Board finding that the subdivision would alter the natural features of vistas, thereby impairing that coastal resource.

The Board argues that because of this finding, reasonable mitigation measures were required, which in this case include seeking alternatives to the proposed subdivision. The Board also argues that while an exemption from coastal review is permitted, in this case it would not be responsible to grant one to a plan not consistent with a policy of the Coastal Area Management Act.

Plaintiffs claim that the Board's decision was erroneous because their proposal would neither impair the historic character and appearance of the historic district nor violate the integrity of the district. They argue that neither state nor local law prohibits construction in historic district, nor gives the Historic District Commission the power to prevent subdivision or new construction. Plaintiffs contend the "(a) Planning and Zoning Commission may not deny an application on the grounds that such application was unacceptable to the (Historict District Commission)." The Board found that the subdivision would not preserve the historic streetscape, and therefore would impair the appearance and historic character of the historic district. The Board also stated that "(t)he residents who voted fo form an Historic District were given assurance of preservation of their historic neighborhood even though they knew certain freedoms of future

development would be regulated and restricted." The Board argues that construction of a new house on plaintiffs' front lawn would be a "severe blow" to the district, and "(i)f permitted, not only would it discourage preservation, but would be an open invitation to speculators seeking development. The public welfare and future generations deserve better."

Finally, plaintiffs raise the issues of reliance and estoppel. Their position is that the grant of preliminary approval by the Commission estops the Board from denying approval. They contend that prior to submitting their proposal to the Commission, they met with staff members to ascertain that their subdivision would be legal. They purchased additional property and altered their plan. When the plan was submitted, preliminary approval was granted subject to fourteen conditions. Plaintiffs claim that they were led to believe that if they met the fourteen conditions as well as the regulations, the final plan would be approved. They further argue that town officials were aware that a house was planned for Lot One when preliminary approval was granted, and that their reliance on the preliminary approval was justified.

The defendant argues the following points: First, plaintiff applied for and received "preliminary layout" approval under Section 6-265 of the subdivision regulations, which describes the same as "a helpful guide in the preparation of a subdivision plan." Second, the public hearings which were held on the application were not useless gestures or mere formalities, but were held to "afford interested parties an

opportunity to be heard to give the Commission or Board..... guidance." Further, "if in advance of the public hearing, the members felt bound by the preliminary layout regardless of what might be produced at the public hearing, it would be predisposition and the decision rendered would be invalid." Third, estoppel is a shield, not a sword, thus it is improperly invoked by plaintiff. Fourth, municipal estoppel can only result when it has been induced by an agent having authority. Here, the claim of estoppel could only lie, if at all against the Commission, not against the defendant Board, which heard the matter de novo. Further, plaintiffs chose to file their application; they were not induced to do so. Fifth, plaintiffs waived any claim of estoppel against the Commission by petitioning the Board for review. Sixth, preliminary approval does not mean approval. It means if the conditions are met, the plan may be approved. In this case, plaintiffs did not meet all the conditions.

"The first reason given by the Board for denying the Smiths' plan is that: The proposed subdivision did not meet the purposes of the subdivision regulations...It does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape; namely the historic streetscape." (Return of Record #15). The Smiths argue against this reason on the grounds that the proposal met the requirements of the subdivision regulations as written and

the the Town Plan of Development is not a regulation.

Section 6-260 of the Greenwich Municipal Code provides that one of the purposes of the subdivision regulations is to "further the orderly devlopment of the Town in accordance with the Town Plan of Development (Return of Record #8n). The Town Plan of Development has as one of its "Basic Objectives" the preservation of historic resources. (Return of Record #tt). The Town Plan of Development also provides that "Greenwich has a rich...historical heritage that should be protected for the benefit and enlightenment of future generations." (Return of Record #tt,p.5) and that "conserving the Town's ... historical resources is a notably effective land use tool for preserving the essential character and spirit of the community." (Id.at p.16). Other reference to the importance of historic factors appear in the Town Plan of Development. (See, eg, p.26, Return of Record #8n). An evaluation of historical factors is specifically mentioned in the Greenwich Subdivision Regulations, Sec6-266(a) 19, governing subdivisions in the coastal zone.

It is the opinion of the court that the plaintiffs' position is without merit. Not only do the subdivision regulations mention historic factors, but they state as a purpose the development of the town in accordance with the Town Plan of Development, which has preservation of historic resources as a basic objective. Further, given the established public policy favoring historic preservation, see Conn. Gen. Stat. $7-147a et seq AND Greenwich Municipal code $6-307, and the

plaintiffs' deed restriction, it is found that the Board did apply standards contained in the regulations to the subdivision, and plaintiffs had notice that historic factors would be considered.

The Board's finding that the proposal would impair the historic streetscape is supported by the record. The Smiths' side of Strictkland Road is characterized by homes on lots with sweeping front lawns. (Return of Record #8e and 13y). THe plaintiffs plan to convert their front lawn into a building lot and construct theron a house with a thirty feet by forty feet footprint, and setbacks of twenty-five feet from the front property line, twenty feet from the south property line, and fifteen feet from a line of trees. (Return of Record #8e). These exhibits show that construction of a house on the front lawn would drastically alter the streetscape, and support the Board's conclusion in that regard.

The Board also cited the opposition of the Historic District Commission, which, among other things, oversees erection and alteration of buildings in the historic district. (Return of Record # 15).

Although research has revealed no Connecticut cases addressing the precise issue in this case, Victorian Realty Group v. City of Nashua, 534 A.2d 381 (1987) is on point. The issue in Victorian Realty Group was whether a planning board has the authority to reject a subdivision or resubdivision proposal for property in a historic district for reasons relating the historic character and significance of the property. 534 A.2d at 383. The

plaintiff owned two contiguous lots, one containing a main building and a carriage barn, and the other a single family home. He had purchased the second lot in order to integrate it and the carriage house on the first lot into a single lot, which could be developed as a multi-unit apartment dwelling. Id. at 382. He applied for a lot line relocation, but after public hearings and input from the historic district commission, the planning board denied his application for the reason that the historic character and significance of the property required that the main house and carriage house stay together on one lot. Id. The Historic District Commission had recommended against the proposal, expressing concern about any visual separation of the two buildings, and that the conversion would necessitate additional parking which would detract from the residential character of the neighborhood. Id.

The city's regulations authorized the planning board to consider the proposal's effect on health, safety, nuisance, property values, aesthetics, traffic conditions and future highway improvement. Id. at 383. Historic preservation was part of the city's overall plan to promote general community welfare. Id.

Upholding the Board's denial, the court stated: "It would frustrate clearly expressed legislative intent if we were to hold that historic district commissions could not render, and planning boards could not consider, recommendations concerning applications for the subdivision and site plan approval involving an historic district."

Id. at 383. Noting that the historic district commission members are most familiar with the historic district, and "uniquely suited to provide recommendations to the planning board, " the court concluded that the board "may properly consider the historic district commission and may deny the plaintiffs' subdivision application based on factors related to the historic character and significance of the buildings at issue." Id. emphasis added.

In A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E. 2d 444 (1979) the court stated:

> It is widely recognized that preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district..." just as important is the preservation and protection of the setting or scene in which [structures of architectural] and historical sigtnificance] are situated."

A-S-P Associates, 258 S.E. 2nd at 451, quoting Maher v. City of New Orleans, 371 F. Supp. 653, 663 (E.D. La. 1974) (emphasis added)

It is the opinion of this court that it should follow these cases, and hence the Board's consideration of, and decision based on, historic considerations was proper. The evidence on the record supports the Board's finding that the proposed subdivision could impair the appearance of the

historic streetscape. Therefore, it is found that the decision of the Board on this ground is not illegal or clearly erroneous.

As another reason for its decision, the Board stated:

> The property is located in the Coastal Zone of the Town. Therefore, it is subject to the requirements of the Coastal Area Management Act. The Board finds that the proposed subdivision plan would have an adverse impact on coastal resources because of the alteration of natural features of vistas. (Return of Record #15).

The decision of the Commission did not contain any reasons for denial related to the location of the property within the coastal zone (Return of Record #4), and the record of proceedings before the commission does not contain any evidence related to the coastal zone. The board, in its review of the subdivision plan, received the following evidence relative to the coastal zone: Exhibit 8j, photographs of coastal views impacted by the subdivision with a map showing sight lines from three neighboring propertie; and testimony of Jim Sandy of the PLanning and Zoning Commission. Mr. Sandy stated at pages 75-76 that coastal factors and policies of coastal area management must be considered in a decision on a subdivision in the coastal zone, and this includes consideration of historic factors and the significant alteration of natural vistas or viewpoints. Mr. Sandy stated: "...[I]f you place the house down on the street and if you go to the [neighbor's] house

or even to the bungalow and try to get the same view of the water, you are not going to be able to do it."

Section 6-111 of the Greenwich Municipal Code established a coastal zone Overlay on the Town in accordance with Conn. Gen Stat. $22a-90 to 96, the Connecticut Coastal Management Act. Under Subsection (c)A(4) an exemption from coastal site plan review may be given for construction of a conforming single-family residential structure beyond 100 feet of the mean high tide line. At the hearing on this appeal, Mr Smith stated that coastal site plan review was conducted by the Commission on both the preliminary and final subdivision proposal. Section 6-111(c)B provides that "[a]n activity determined to be potentially inconsistent with any of [the standards in Sec. 6-111(c)D] shall have a formal review by the Commission." Among these standards are whether the proposed activity: (1) Is in accordance with the plan of development, (2) Preserves important open space and other features of the natural environment, (3) Does not materially obstruct significant waterfront views, and (4) Is consistent with all of the above purposes as authorized by the State Coastal Management Act. Greenwich Municipal Code $6-111(c)D. Among these purposes is to preserve and enhance coastal resources. Greenwich Municipal Code $6-111(a)A(2). The Board found this purpose was defeated by the Smith's plan, which it found would alter the natural features of vistas.

In support of their position the Board also cites Conn. Gen. Stat. $22a-92(b)(1)(J) which provides "Policies

concerning development, facilities and uses within the coastal boundary are to require reasonable mitigation measures where development would adversely impact historical, archeological or paleontological resources that have been designated by the state historic preservation officer." The Board contends that because alternatives to the proposed subdivision were available which would mitigate the impact on the views, these alternatives must be required.

"The Coastal Management Act delegates the administration of the state-wide policy of planned coastal development to local agencies charged with responsibility for zoning and planning decisions. See General Statutes $$22a-105, 22a-106. the act envisages a single review process, during which proposals for development within the coastal boundary will simultaneously be reviewed for compliance with local zoning requirements and for consistency with the policies of planned coastal development." General Statutes $22a-109.

Vartuli v. Sotire, 192 Conn. 353,358 (1984). Section 6-266(a)(20) provides that "(f)or subdivisions within the coastal zone boundaries, the standards contained in the Coastal Area Management Act of the State of Connecticut shall be applied" in addition to the other standards applicable to subdivisions. Conn.Gen. Stat. $22a-106, the criteria and process for coastal site plans, provides in subsection (a) that a municipal board "shall determine whether or not the potential adverse impacts of the

proposed activity on both coastal resources and future water-dependent development activities are acceptable."

It is found that the only physical evidence presented to the Board relative to its conclusion that natural vistas would be altered by the subdivision is Exhibit Bj, showing the site lines to Mill Pond from homes on Strickland Road. This evidence does not support the Board's conclusion and the the standard set forth in regulation 6-111(D)(3), that "significant" views would be "materially" obstructed by the subdivision, has not been met. It is found that the photographs and map indicate that the planned house on lot One would have minimal impact of existing view of the pond. THerefore, it is the opinion of the court that the record does not reasonably support this conclusion reached by the Board, and this reason is insufficient to support the decision to deny the subdivision. Defendant seems to believe that any development which changes a view necessarily has an adverse impact on that view, and such a position is contrary to the policy of the CAMA of promoting both the natural environment and economic growth. See Conn. Gen. Stat. $22a-92.

Because the Board's action is to upheld if any one of the stated reasons is sufficient to support the decision, see Primerica v. PZC, 211 Conn. 85,96 (1989), it is found that the appeal be dismissed because the reasons relating to historic factors are sufficient to support the decision.

Judgment may enter accordingly.

John J.P. Ryan, J.

89 A

Town of Greenwich
May 15, 1989

Harry E. Peden Jr., Esq.
Whitman and Ransom
100 Field Point Rd.
Greenwich, Conn. 06830

Dear Sir:

This will notify you that effective May 15, 1989 the Planning and Zoning Board of Appeals of the Town of Greenwich (Present: Paul Lynch, Chairman, Barbara Hopkins, Secretary, William Rader, Louisa Stone and Edward Manuel) rendered the following decision.

Appeal No. 7400 (Continuation) heard pursuant to due notice on May 3, 1989.

Appeal of E. Don Smith and Eileen Smith for review of the Planning and Zoning Commission decision dated November 22, 1988 and effective December 8, 1988 denying subdivision Application #1066 of E.Don Smith and Eileen Smith, to subdivide land on the westerly side of Strickland Road (35) Cos Cob, in the R-7 zone.

It was resolved that said appeal be denied on the following grounds:

Pursuant to statute the Board is authorized to review on appeal decisions of the Planning and Zoning Commission on matters involving subdivision. The statute provides in such instances for the hearing of the Board to be "de novo" Further in the instant appeal, the property in question is located in an Historic District, thus bringing into

play Article 5 of the Greenwich Municipal Code. Accordingly, the Board heard extensive testimony, and evidence was presented, regarding such code provisions. After careful considerations of this and other testimony and evidence presented, the Board reached its decision that this appeal should be denied.

The proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260, thereof. It does not conform to the Town of Greenwich Plan of Developoment in that it does not meet the basic objectives of preservation of historic and architectural resources. Further-more, it does not preserve the natural features of the landscape; namely, the historic streetscape.

Applicants' plan proposed in an Historic District was opposed in testimony and in writing by the Historic Districxt Commission which among other things, oversees erection and alteration of buildings in said district. Such plan was also opposed by residents in the District. The Board finds that the integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired by this plan. The residents who voted to form an Historic District were given assurances of preservation of their historic neighborhood even though they knew certain freedoms of future development would be regulated and restricted.

The applicants were aware of the property's location in the Historic

District since that fact is stated in their deed and they formerly resided in this District at another address. The Board concluded that the applicants' development rights were not deprived because other alternatives for development are available.

The property is located in the Coastal Zone of the Town. Therefore, it is subject to the requirements of the Coastal Area Management Act. The Board finds that the proposed subdivision plan would have an adverse impact on coastal resources because of the alteration of natural features of vistas.

A related although not binding case is Victoria Realty Group v. City of Nahua (No.86-439, decided November 5, 1987), in which the Supreme Court of New Hampdshire ruled that a planning board in New Hampshire may reject a proposed resubdivision when a preservation commission recommends against the proposal. Here the owner of a lot containing both a three-story Victorian house and a detached carriage house sought unsuccessfully to convert the carriage house for either office use or dwelling units. The owner then purchased an adjoining property in hope that he could relocate the lot line between his two properties so that the carriage house would become part of the second expanded lot and he could then convert the carriage house to new uses. The Planning Board denied the lot line relocation stating that the historical character and significance of the property requires that the main house and carriage house remain on one lot. The Supreme Court upheld the board's

decision as indicated above.

Because of the foregoing, the applicants' request for subdivision of property into three lots is hereby denied.

Mr. Lynch, Mrs. Hopkins, Mrs. Stone, and Mr. Rader voted to deny the appeal.

Mr. Manuel abstained.

The date of these minutes and rendition date of said decision is May, 15, 1987.

Barbara H. Hopkins
Secretary

Town of Greenwich

December 8, 1988

Mr. E.Don Smith
35 Strickland Road
Cos Cob, Ct. 06807

Re: Subdivision Application # 1066 of
E.Don Smith and Eileen Smith
Subdivision Plan prepared by J.A. Kirby
Dated March 17, 1988,
Revised September 1988.

Dear Mr. Smith:

The Planning and Zoning Commission held a meeting on November 22, 1988 at which the Commission considered the above referenced application and took the following action:

The commission adopted the following final resolution: "WHEREAS, the Town of Greenwich Plan of Development, 1984 states as a basic development objective the preservation of historic and architectural resources; and

"WHEREAS, the subject lot is contained within the duly established Mill Pond Historic District, and

"WHEREAS, the Commission recognizes that the existing streetscape, which is defined by the open space of the subject tract in relation to adjoining historical properties, structures, and open spaces is a significant element of the historic district in terms of visual appearance as well as historic use and occupancy of the land; and

"WHEREAS, the subdivision would permit construction of a house in the previously defined, significant open space, thereby disrupting an essential characteristic of the historic districk; and

"WHEREAS,a stated purpose of the Subdivision Regulations of the Town is to 'Further the orderly development of the Town in accordance with the Town Plan of Development'"; and

"WHEREAS, the Commission finds that there are other zoning options for development of the property whcih would provide for the same or greater number of dwelling units while preserving the site's open space and natural features which are significant components of the historic streetscape;

"THEREFOREE, BE IT RESOLVED that final Subdivision #1966 of E. Don dSmith and Eileen Smith owners of property located on Strickland Road consisting of a record sheet prepared by J.A. Kirby Company dated March 17, 1988 revised September 26, 1988 is hereby denied."

Sincerely,

John Gessner
Senior Planner

TOWN OF GREENWICH

Mr. E.Don Smith
35 Strickland Road
Cos Cob, Ct. 06807

Location:
Strickland Rd.

Town Project No. 87-4A

Re: Subdivision Application # 1017-C
Smith

At the Planning and Zoning Commision's meeting held on April 21, 1987 after studying your preliminary subdivision plan, it was decided to notify you of the following results:

The Planning and Zoning Commission advised the applicant to proceed to a final subdivision plan subject to the following being resolved prior to final application submission:

1. That Lot 1 be shifted to the southerly property boundary of the tract. Concurrently that the portion of the park and playground area displaced by the relocation of Lot 1 shall be moved to the northerly property line of Lot 1.

2. The commission observed that the area reserved for park and playground being 14.67%, conventionally required to be 15%, is acceptable as it is calculated from a gross area which includes a **free-throw** lot for which park and playground is not required.

3. The utility easement shall be located so as to minimize impacts to significant trees.

4. The applicant shall meet with the Historic District Commission in order to determine an appropriate house location for Lot 1. The preservation of significant trees shall be taken into consideration in determining house location, as well as conformity as nearby as possible to the existing setback/streetscape of house locations to the south.

5. The applicant shall meet with the Conservation Coordinator in order to develop tree preservation details as required by house and utility easement siting.

6. That the Declaration of Restrictions for the reserved areas be submitted to the Law Department in accordance with the model document.

7. That provisions for access easements be indicated on the record sheet.

8, That the existing southerly curbcut be the sole access way to Lot 1.

9. That the appropriate utility easements to the northerly property (Ward) be indicated on the record sheet.

10. That a sight line improvement plan indicating any modifications to existing features of walls and trees, etc. be submitted for review and approval by the Department of Public Works. Historic District Commission should also comment on alternate plans to achieve acceptable sight distrance, if significant trees or the stone wall are adversely effected.

11. The applicant must obtain a sewer

permit prior to the issuance of a Building Permit.

12. The applicant shall obtain confirmation from the Engineering Division that there will be no adverse impacts to nearby properties and water bodies due to site drainage.

13. The following note is to appear on the construction sheet: "Prior to any excavation(s) the applicants(s), in accordance with Public Aact 77-350, shall be required to contact Call Before You Dig, Inc. at 1-800-922-4455 for markout of underground utilities."

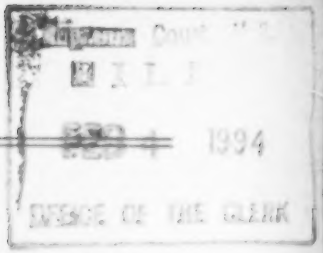
14. Submit a driveway plan in accordance with Sec. 6-131. In the event significant open space or trees are impacted, it is recommended that the applicant apply for a variance in order to use as much of the existing driveway as possible while providing safe sight distance and maneuverability. The plan should be reviewed with Planning Staff, HDC and D.P.W. prior to submitting final plan.

Additional details, if any,will be available in the Minutes of this meeting.

Sincerely,

Eric Brower
Director of Planning
and Zoning

(3)



No. 93-1092

In the

Supreme Court of the United States

October Term, 1993

E. DON SMITH and EILEEN SMITH,
Pro Se Petitioners,

v.

ZONING BOARD OF APPEALS FOR
THE TOWN OF GREENWICH
— and —
THE HISTORICAL SOCIETY OF THE TOWN OF
GREENWICH, INCORPORATED
— and —
ANITA DE LESSUPS KEEFE,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of the State of Connecticut

BRIEF OF RESPONDENT THE HISTORICAL SOCIETY OF THE TOWN OF GREENWICH, INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. YAVIS, JR.
Counsel of Record

RUSSELL L. BRENNEMAN
EVERETT E. NEWTON
MURTHA, CULLINA, RICHTER
AND PINNEY
CityPlace I - 185 Asylum Street
Hartford, Connecticut 06103-3469
(203) 240-6000

February 4, 1994

19 pp

List of Parties

The parties to the proceeding below were:

Plaintiffs-Appellees:
E. Don Smith and Eileen Smith

Defendant-Appellant:
Zoning Board of Appeals for the Town of Greenwich

Additional Defendant-Appellant:
The Historical Society Of the Town of Greenwich, Incorporated*

Additional Defendant-Appellant:
Anita De Lessups Keefe

Amicus Curiae in the Connecticut Supreme Court:
Planning & Zoning Section of Connecticut Bar Association

---

* Pursuant to Sup. Ct. R. 29.1, The Historical Society Of The Town of Greenwich, Incorporated states that it is a corporation having no parent corporation, subsidiaries or affiliates.

Table of Contents

List of Parties i

Table of Authorities iii

Citations to Opinions Below 1

Jurisdiction 2

Citations to Statutes, Rules and Regulations 2

Statement of the Case 3

Summary of Argument 7

ARGUMENT 9

I. This Court Lacks Jurisdiction 9

A. The Claimed Property Rights Have Not Been Finally Determined 9

B. The Petition Poses No Federal Question. 10

CONCLUSION 14

Table of Authorities

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 10

City of Chanute v. Trader, 132 U.S. 210 (1889) 11

City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) 8, 12

City of New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891) 11

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 10

Kolender v. Lawson, 461 U.S. 352 (1983) 13

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) 10

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 7, 9, 10

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) 8

N.L.R.B. v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) 11

Pollard v. Dwight, 8 U.S. (4 Cranch) 421 (1808) 13

R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) 13

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 11

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 10

Smith v. Zoning Board of Appeals of Town of Greenwich, 227 Conn. 71 (1993) . . . . . passim

Smith v. Zoning Board of Appeals of Town of Greenwich, 29 Conn. App. 28 (1992) 2

Smith v. Zoning Board of Appeals of Town of Greenwich, No. CV-0101333S (Conn. Super. Ct. Apr. 10, 1991) 2

Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 7, 9

Yee v. City of Escondido, 112 S. Ct. 1522 (1992) 13

Statutes

28 U.S.C. § 1257 . . . . . 2, 8, 9, 10

Other Authorities

Sup. Ct. R. 10.1(c) 3, 11

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993
No. 93-1092

E. DON SMITH and EILEEN SMITH,
Pro Se Petitioners,

v.

ZONING BOARD OF APPEALS FOR
THE TOWN OF GREENWICH

and

THE HISTORICAL SOCIETY OF THE TOWN OF
GREENWICH, INCORPORATED

and

ANITA DE LESSUPS KEEFE,
Respondents.

BRIEF OF RESPONDENT THE HISTORICAL SOCIETY OF THE TOWN OF GREENWICH, INCORPORATED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Citations to Opinions Below

Smith v. Zoning Board of Appeals of Town of Greenwich, 227 Conn. 71 (1993) (reproduced in Petitioners' Appendix ("A.") at A.1 - A.31).

Smith v. Zoning Board of Appeals of Town of Greenwich, 29 Conn. App. 28 (1992) (reproduced at A.53 - A.67), *rev'd and remanded*, 227 Conn. 71 (1993).

Smith v. Zoning Board of Appeals of Town of Greenwich, No. CV-0101333S, slip op. (Conn. Super. Ct. Apr. 10, 1991) (available on Westlaw at 1991 WL 57943), *rev'd*, 29 Conn. App. 29 (1992), *rev'd and remanded*, 227 Conn. 71 (1993).

Jurisdiction

This Court lacks jurisdiction to grant a writ of certiorari to the Connecticut Supreme Court pursuant to 28 U.S.C. § 1257 because the Smiths' uncompensated taking claim has not finally been decided and because their claims raise no substantial federal question.

Citations to Statutes, Rules and Regulations

28 U.S.C.A. § 1257(a) (1993):

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Sup. Ct. R. 10.1(c):

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

. . . .

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Greenwich Land Use Regulations § 6-266(a):

Note: The text of the regulation is reproduced at A.19 n.10 and in Appendix of Respondent Zoning Board of Appeals of Town of Greenwich.

Statement of the Case

E. Don Smith and Eileen Smith, husband and wife, own a single-family residence located on Strickland Road in the Mill Pond Historic District in Greenwich. A.4 (*Smith v. Zoning Board of Appeals of Town of Greenwich*, 227 Conn. 71, 74 (1993)). The Smiths' deed states that "[s]aid premises are conveyed subject to . . . [r]egulations imposed by reason of the fact that the premises are part of a historic district as established by the Town of Greenwich. . . ." A.9. The town's regulations permit the town planning and zoning commission ("commission"), in considering a subdivision application, to consider an assessment of various environmental factors, expressly including historical factors. *See*

Greenwich Land Use Regulations § 6-266(a)(19)(h) (reproduced at A.19-20 & n.10).

The Smith property, like others in the neighborhood, contains a house, a barn and a sweeping front lawn. A.7. In January 1987, the Smiths submitted a preliminary subdivision application seeking to subdivide their property into three lots, one containing their residence, another containing the barn, and a third containing a single family house to be constructed on the presently unimproved front lawn. A.4-7. After a hearing on the preliminary application, the commission ordered the Smiths to meet with the historic district commission[1] to determine an appropriate location for the proposed house. A.4-5. The historic district commission ultimately opposed the Smiths' subdivision proposal. A.6.

The Smiths submitted a final subdivision application with the proposed building lot on the front lawn, and on November 22, 1988, the commission denied the application because granting it would "permit construction of a house in the . . . significant open space [the front lawn], thereby disrupting the essential characteristic of the historic district." A.6. The Smiths appealed to the Planning and Zoning Board of

---

1 The historic district commission was established pursuant to section 7-147f of the Connecticut General Statutes to determine whether proposed buildings are consistent with the historic district. A.26. The respondent Historical Society of the Town of Greenwich, Inc. is unrelated to the historic district commission or to the respondent board. The Historical Society does, however, expressly adopt the arguments in the board's Brief in Opposition to the Petition for Writ of Certiorari.

Appeals (another respondent in this matter, hereinafter "the board"), which conducted a public hearing and denied the Smiths' appeal. The Connecticut Supreme Court described the board's decision:

> The board concluded that the proposed building on lot 3 would disrupt the "sweeping front lawn" and, therefore, would not be consistent with the district's historic streetscape. The board stated that "[t]he proposed subdivision did not meet the purposes of the Subdivision Regulations as provided in Section 6-260, thereof. It does not conform to the Town of Greenwich Plan of Development in that it does not meet the basic objectives of preservation of historic and architectural resources. Furthermore, it does not preserve the natural features of the landscape; namely, the historic streetscape."

A.7 (footnote omitted).

The Smiths appealed the board's decision to the Superior Court, which disagreed with one of the bases for the decision but nevertheless dismissed the appeal, concluding that other statutes and regulations supported the board's action. A.8. The Smiths appealed further to the Connecticut Appellate Court, which reversed the judgment of the trial court and held that the board lacked the authority to consider historical factors in deciding whether to grant or deny a subdivision application. A.9-10. One factor in the Appellate Court's ruling was its belief that the terms "historic factors" and "historic streetscape" were not known and fixed standards. A.10.

The Connecticut Supreme Court granted the defendants, respondents in this Court, certification to appeal. The court reversed the judgment of the Appellate Court and directed reinstatement of the trial court's judgment dismissing the appeal. A.31. The Connecticut Supreme Court concluded that the Greenwich Town Charter, established by special act of the Connecticut legislature, A.11, authorized the town to adopt subdivision regulations that include consideration of historical factors: "we conclude that because the phrase 'public health and safety' includes environmental factors, it includes historical factors." A.16.

The Connecticut Supreme Court analyzed the regulations as adopted, and it concluded that the regulations authorized the board to consider the historic district commission's evaluation of the historic implications of the subdivision application. A.19-23. The court concluded, as a matter of state statutory construction, that the terms "historical factors" and "historic streetscapes," as used in the regulations and the town plan, "'are as reasonably precise as the subject matter requires and are reasonably adequate and sufficient to guide the commission and to enable those affected to know their rights and obligations.'" A.23. The court observed that this ruling disposed of the Smiths' due process claims. A.26 n.14.

The Connecticut Supreme Court rejected the Smiths' claim that denial of their subdivision application was an uncompensated taking, noting that the Smiths had failed to establish a lack of viable options for their property and that the board had found, as a matter of fact, that such options did exist. A.29-30. Relying on Connecticut law, the court held that there had been no final deprivation of the reasonable and proper use of the Smiths' property and therefore no unconstitutional taking without just compensation. A.30 & n.17 (also

noting that testimony of one commission member concerning a second option did not establish the board's position on viable alternatives).

Finally, the Connecticut Supreme Court declined to consider the Smiths' claim that the subdivision regulations had been unequally applied to them, holding that the issue had been only peripherally raised before the board and was never corroborated by evidence. A.30 n.18. On this record, the Smiths have petitioned this Court for certiorari review of the Connecticut Supreme Court's decision.

Summary of Argument

The board's factual finding that other viable options exist for the development of the Smiths' property renders the Smiths' petition for a writ of certiorari premature. The effect of the disputed subdivision regulation cannot be measured until the Smiths submit alternative development plans for their property and the board acts on the new application. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 200 & n.18 (1985). If the board ultimately denies all alternatives, the taking claim cannot be finally established until the Smiths show that they have been inadequately compensated for any lost property interest. *See Williamson*, 473 U.S. at 194-96 (claimant must seek post-deprivation remedy via available inverse condemnation proceeding to establish unjust compensation). Accordingly, this petition is unripe and must be dismissed for lack of jurisdiction.

Even if no subdivision is ever permitted, the Smiths will not have been denied all economically viable use of their property, and therefore will remain unable to claim that a

regulatory taking has occurred. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 674 n.8 (1976) (hornbook law that "mere diminution of market value or interference with the property owner's personal plans and desires relative to his property is insufficient to invalidate a zoning ordinance or to entitle him to a variance or rezoning"). The Smiths will not be deprived of the present and historical uses of their residential property and have not even claimed a diminution in its value based on the board's action to date. They have therefore failed to establish a taking claim that presents a proper federal question reviewable under 28 U.S.C. § 1257.

Without a genuine claim that their property has been taken without adequate compensation, the Smiths have no basis for their due process allegation. The 14th Amendment's guaranty of due process protects only substantial rights, not the bare right to a particular form of procedure. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974). If the taking claim is premature, so too is the due process claim that must depend for its substance on the claimed taking. Moreover, the due process that the Smiths seek here has already been provided beyond all constitutional mandates by the state courts' review of their claim. *Eastlake*, 426 U.S. at 676-77. The Smiths have presented their case in hearings before the planning and zoning commission, the board, and all three levels of the Connecticut court system. The Connecticut Supreme Court concluded that the disputed regulation includes reasonably precise standards based on prior judicial usage. A.23-26 & n.14. The construction of Connecticut law by the state's highest court is binding on this Court. *Eastlake*, 426 U.S. at 674 & n.9. Nothing more is required to satisfy the demands of due process.

ARGUMENT

I. This Court Lacks Jurisdiction.

Before this Court can exercise certiorari jurisdiction to review a state court decision, the issue posed must be finally determined and must present a substantial federal question. 28 U.S.C. § 1257. The petition in this case fulfills neither requirement.

A. The Claimed Property Rights Have Not Been Finally Determined.

The board determined as a matter of fact that the Smiths have other viable options for the development of their property.[2] A.30 The Smiths, however, have not returned to the commission with any alternative development proposal. An essential prerequisite to the Smiths' taking claim is a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986) (a single subdivision proposal rejected by commission is not determinative of final application of regulation); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 190 n.11 (1985) (petitioner's

---

2 The speculative remark by an individual board member as to the prospects of another proposal did not rise to the level of a factual finding or a determination of all viable alternatives. A.30 n.17. The Smiths' reliance on the factual import of that remark, Petition at 24-25, is an inappropriate attack on the facts that militates against granting the petition in this case.

failure to seek variance makes it "impossible to tell whether the land retain[s] any reasonable beneficial use"); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (constitutionality of zoning ordinance cannot be judged until petitioner applies to make actual improvements); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 631-33 & n.12 (1981) (appeal dismissed for lack of jurisdiction because city's open space requirement did not deprive utility of all beneficial use of property where state court had not found facts to support taking). Absent a finding by the state court that the board's application of the regulation deprives the Smiths of all economically viable use of their property, their petition to this Court is premature and must be dismissed for want of jurisdiction. *MacDonald*, 477 U.S. at 351-52.

B. The Petition Poses No Federal Question.

This Court has no jurisdiction to review a judgment of a state's highest court unless a substantial federal issue is presented. 28 U.S.C. § 1257(a). To raise a substantial federal question giving rise to certiorari jurisdiction in this Court, the Smiths must show not only that the state's highest court has upheld the disputed statute or regulation, but also that they have been deprived of all economically beneficial use of their property without just compensation. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312-13 & n.8 (1987); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893 (1992). As a matter of fact, the board's denial of the Smiths' subdivision application has not deprived the Smiths of all use of their property. A.30. Accordingly, the state court holdings are conclusive of the Smiths' claims, and no federal question is presented. *See First English*, 482 U.S. at 312-13 & n.8 (certiorari jurisdiction requires both a taking and a decision upholding state statute authorizing the taking).

Although the Smiths' petition makes liberal use of the terms due process, uncompensated taking and unequal protection, their bare averment of unconstitutionality does not itself create a substantial federal question. *City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 87 (1891). The facially frivolous elements of the petition, such as the frequent appeals to facts not established below, *e.g.*, Petition at *i*, 4, 6, 11, 20, 24-25, *see N.L.R.B. v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) (function of this Court is not to review factual findings or evaluate evidence), and to arguments contained in an amicus brief filed with the Connecticut Supreme Court appeal, *e.g.*, Petition at 1, 7-8, 15-16, do not create a substantial federal question. *City of Chanute v. Trader*, 132 U.S. 210, 214 (1889). Nor can the Smiths raise a substantial federal question by ignoring this Court's previous decisions governing regulatory takings and due process. *See* Sup. Ct. R. 10.1(c) (certiorari should be granted only when state court decision contains important question of federal law that has not been decided by this Court or that conflicts with such decision); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74 (1955). Eliminating these distracting elements from the petition leaves no federal question for this Court to decide.

The Connecticut Supreme Court properly disposed of all of the Smiths' claims under state law. It concluded that the board was authorized to consider historical factors in its deliberations under the applicable subdivision regulation. A.16. In so deciding, the Connecticut Supreme Court ruled that the legislatively authorized town charter provided for subdivision regulations consistent with "health or the public safety," that public health and safety includes consideration of the environment, that the environment includes historical factors, and that the consideration of historical factors was expressly included in the regulation. A.14-16, A.19-23.

Finally, the Connecticut Supreme Court noted that the terms "historical factors" and "historic streetscapes," used in the regulation and in the town plan (which serves as an interpretative guide for the board), have been given reasonably precise meanings through prior judicial usage. A.23-25. The Connecticut Supreme Court's construction of Connecticut law is binding on this Court. *Eastlake*, 426 U.S. at 674 n.8. The Smiths' claims as to the meaning of the statutes and regulations are therefore beyond this Court's jurisdictional reach.

The Smiths' due process claim is disposed of by the Connecticut Supreme Court's conclusion that the regulation and the references to "historical factors" and "historic streetscapes" have reasonably precise meanings, sufficient to notify the Smiths of their subdivision rights. *See* A.26 n.14. The due process requirements of the 14th Amendment are satisfied by state court review of the Smiths' claim that the denial of their subdivision application was unreasonable. *Eastlake*, 426 U.S. at 676-77. The gravamen of the Smiths' claim is that they did not know that subdivision approval could be withheld on the basis of historical factors. Petition at 19-21. As the Connecticut Supreme Court held, the answer to that claim lies in the regulation, which expressly refers to "historical factors," in the town plan which refers to the need to preserve "historical streetscapes," and, perhaps, in the Smiths' own deed, which warns of potential restrictions based on the historic location of their property. A.9, A.19 n.10, A.24.

The Smiths also claim that the term "public health and safety," as the Connecticut Supreme Court has applied it, is arbitrary and lacking standards. Petition at 18-19. The argument is specious because the regulation and town plan provide specific notice that historic factors are relevant to

subdivision applications. It is axiomatic that the statute and regulation are construed together and that the Connecticut Supreme Court's construction is as binding as if the construction were written into the statute. *R.A.V. v. St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Kolender v. Lawson*, 461 U.S. 352, 353, 354(1983); *Pollard v. Dwight*, 8 U.S. (4 Cranch) 421, 429 (1808) (Marshall, C.J.). The Connecticut Supreme Court properly concluded that these terms point to identifiable and sufficiently distinct historical standards that property owners are on notice of the types of historical facts that will be considered. A.25. This interpretation of the Connecticut statutory scheme leaves nothing for this Court to decide.

The final element of the Smiths' petition is their claim of unequal treatment or discrimination. The Connecticut Supreme Court ruled that this claim was only peripherally raised below and was unsupported by any evidence. A.30. This Court does not decide issues that have not been properly raised or addressed below. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531 (1992).

CONCLUSION

For all the foregoing reasons, The Historical Society of the Town of Greenwich, Inc., respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN C. YAVIS, JR.
RUSSELL L. BRENNEMAN
EVERETT E. NEWTON

All of:
MURTHA, CULLINA, RICHTER and PINNEY
CityPlace I - 185 Asylum Street
Hartford, Connecticut 06103-3469
Telephone: (203) 240-6000
Attorneys for Respondent
The Historical Society of the Town of Greenwich, Inc.

No. 93-1092

Supreme Court, U.S.
FILED
FEB - 4 1994

In The

Supreme Court Of The United States

October Term, 1993

E. DON SMITH and EILEEN SMITH,
Petitioners,

v.

ZONING BOARD OF APPEALS
OF THE TOWN OF GREENWICH, THE HISTORICAL
SOCIETY OF THE TOWN OF GREENWICH, INC.,
and ANITA DE LESSUPS KEEFE,
Respondents.

On Petition for Writ of Certiorari
To The Connecticut Supreme Court

BRIEF OF RESPONDENT ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. MEERBERGEN
Town Attorney

*JOYCE H. YOUNG
Assistant Town Attorney
*Counsel of Record
Town of Greenwich
Law Department
101 Field Point Road
Greenwich, Connecticut 06830
(203) 622-7878

Attorneys for Respondent
Zoning Board of Appeals of
the Town of Greenwich

44 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii-iii

PERTINENT STATUTES AND REGULATIONS.....iv-vi

JURISDICTION..... 1

STATEMENT OF THE CASE..... 1

SUMMARY OF ARGUMENT..... 11

ARGUMENT..... 12

I. THE "DUE PROCESS" CLAIM RAISES NO REVIEWABLE FEDERAL QUESTION..... 12

1. The Issue Was Neither Raised Nor Addressed In the State Courts..... 13

2. No Substantial Federal Question is Raised..... 15

II. THE COURT SHOULD DECLINE TO HEAR PLAINTIFFS' EQUAL PROTECTION CLAIM..... 19

III. PLAINTIFFS' "TAKINGS" CLAIM IS NOT RIPE; IN ANY EVENT, NO TAKING HAS OCCURRED..... 21

CONCLUSION..... 26

TABLE OF AUTHORITIES

Page

Cases

Arminio v. Butler, 183 Conn. 211, 440 A.2d 757 (1981)..... 17

City of New Orleans v. New Orleans Waterworks Co., 142 U.S. 79 (1902)..... 16

Gil v. Inland Wetlands and Watercourses Agency, 219 Conn. 404, 593 A.2d 1368 (1991).....22, 24

Illinois v. Gates, 462 U.S. 213 (1983)..... 13

Lucas v. South Carolina Coastal Comm'n, 112 S. Ct. 2886 (1992).. 24

Luf v. Southbury, 188 Conn. 336, 449 A.2d 1001 (1982)..... 22

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986)..... 22

Millenger v. Hartuper, 6 Wall 258 (1867)..... 16

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).. 22

Seattle, Renton & Southern Railway Co. v. State of Washington, 231 U.S. 568, (1913)..... 18

Terminillo v. Chicago, 337 U.S. 1, (1948)..... 17

TABLE OF AUTHORITIES- Continued

Page

Cases

Victorian Realty Group v. City of Nashua, 130 N.H. 60, 534 A.2d 381 (1987)..... 18

Webb v. Webb, 451 U.S. 493, 495 (1981)..... 14

West Hartford Taxpayers Assn., Inc. v. Streeter, 190 Conn. 736, 462 A.2d 379 (1983)..... 17

Williamson County Regional Planing Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).....22, 24

Yee v. City of Escondido, 112 S. Ct. 1522 (1992).....13, 15

STATUTES

28 U.S.C. §1257..... 13

Conn. Gen. Stat. §7-174a et seq... 1

RULES

U.S. Supreme Court Rule 10.1(1-c). 11

PERTINENT STATUTES AND REGULATIONS

Statutes

28 U.S.C. 1257(a)

§1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rules

Supreme Court Rule 10.1(b) and (c)

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

...

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has

decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Regulations

Greenwich Municipal Code:

Sec. 6-266(a)(19)

Sec. 6-296(d)

[Complete copies of the pertinent sections of the municipal code are set forth at pages A-1 through A-3 of the attached appendix, referred to herein as "Resp. A."]

JURISDICTION

The Court lacks jurisdiction pursuant to 28 U.S.C. §1257 to grant a writ of certiorari to the Connecticut Supreme Court. Plaintiffs' due process and equal protection claims do not raise substantial federal questions and were not properly raised or addressed below. Plaintiffs' taking claim is not ripe for review.

STATEMENT OF CASE

The Mill Pond Historic District (the "Historic District") was created in 1975 in the Town of Greenwich (the "Town") pursuant to Connecticut's historic preservation statute. Conn. Gen. Stat. §7-147a-y (1989); plaintiffs' appendix, referred to herein as "A.", at 70. The Historic District was singled out for preservation for its considerable cultural and historic significance,

and because it "constituted a group of houses in a compatible setting which expressed modes of living of the early American and Victorian periods. No visual or other intrusions compromised the area's character." Id.

In 1984, plaintiffs purchased their property in the heart of the Historic District. A. 70. Their deed specifies that "the premises are conveyed subject to ... [r]egulations imposed by reason of the fact that the premises are part of a historic district as established by the Town of Greenwich." A. 71. The property contains a house and a barn to the rear. Id. In front of the house is a sweeping front lawn. Id. With the subsequent purchase of a small adjoining strip of property, plaintiffs owned sufficient square footage to subdivide the property into three lots. A. 76.

Plaintiffs submitted to the Town's Planning and Zoning Commission (the "Commission") a proposal to subdivide the property in early 1987. Under the proposal, two lots would contain respectively the existing house and the barn converted as a house. A third lot would be carved out of the front lawn in front of the existing house, with a new house slated for construction twenty-five feet from the street. A. 83.

The Commission granted preliminary approval for the proposed subdivision, subject to conditions. A. 96-98. Those conditions included: shifting the location of the new front lot, changing the site design to protect significant trees and meeting with the Historic District Commission "to determine an appropriate house location" for the new house that would protect the trees and conform "as

nearly as possible to the existing set-back/streetscape" of adjacent properties in the Historic District.[1] A. 96-97.

On November 22, 1988, the Commission denied the proposed subdivision after a public hearing. The Commission found that the "existing streetscape," which it defined as the "open space of the subject tract in relation to adjoining historical properties, structures, and open spaces," was a significant element of the Historic District and that the proposed subdivision would "disrupt" that "essential characteristic." A. 94-95. The Commission further found

---

[1]The conditions themselves belie plaintiffs' assertion at pages 4-5 of the petition for certiorari (referred to herein as "Pet.") that there was never any discussion of environmental, public health or safety concerns "or any objection to constructing a house on the front building lot" in the six months after conditional approval.

that there were other development options for the property that would preserve the significant components of the historic streetscape. A. 95.

At plaintiffs' request, the respondent Planning and Zoning Board of Appeals of the Town of Greenwich (the "Board") cons dered the subdivision application de novo. The Board held extensive hearings where plaintiffs were represented by counsel. The proposal was opposed by, among others, twenty-three property owners within the Historic District and representatives of the Historic District's Commission and the Town's Historical Society and Conservation Commission.

The Board upheld the Commission's denial of the subdivision application, finding that it did not conform to the subdivision regulations and the Town's

plan of development because it failed to preserve the historic streetscape. A. 90-93. As the Board found, the "integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired" by the plan. A. 91.

The Board rejected plaintiffs' takings argument with the findings that plaintiffs knew that the property was located in the Historic District and that their "development rights were not deprived because other alternatives for development [were] available." A. 91-92. The Board's decision makes no mention of any assertion that plaintiffs were denied due process or received discriminatory treatment.

The plaintiffs appealed the Board's decision to the Connecticut Superior Court. After trial, that court

upheld the Board's finding that the proposed construction of a house on the front lawn of the property would "drastically alter the streetscape," thereby impairing the character of the Historic District. A. 83. The court found that the Board had applied standards contained in the subdivision regulations which included specific references to consideration of historic factors. A. 82. Therefore, the Court concluded, plaintiffs "had notice that historic factors would be considered." A. 83.

The superior court's decision makes no mention of: any claimed denial of due process, an equal protection argument, a claim under 28 U.S.C. §1983, or any assertion of discriminatory treatment.

The plaintiffs appealed to the Connecticut Appellate Court. The appellate court reversed, citing four reasons:

> (1) the enabling statutes on subdivisions did not give the defendant the authority to include historical factors in its regulations; (2) the terms "town plan of development," "historic factors" and "historic street-scape" are not known and fixed standards required for subdivision regulations; (3) the Greenwich town charter forbids the board from denying a subdivision application based on the plan of development; and (4) it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district.

Smith v. Zoning Board of Appeals, 29 Conn. App. 28 (1992) (A53-67). No mention was made by the appellate court of an alleged due process violation, an equal protection argument or any claim of discriminatory treatment.

The Connecticut Supreme Court accepted certification and reversed the judgment of the appellate court. A. 1-31. The supreme court held that the Town's charter authorized the Commission to adopt subdivision regulations permitting the consideration of factors relating to historic preservation. Drawing on prior interpretations of the term "health and safety" in the context of other Connecticut land use statutes, the court concluded that this language in the charter permitted consideration of environmental concerns, including historical factors. A. 11-16. The court further concluded that under state law principles of statutory construction, the terms "historical factors" and "historic streetscape" in the subdivision regulations were reasonably precise. They were therefore suf-

ficient to guide the Commission and "certainly apprised..." plaintiffs that historic factors would be considered. Id.

The supreme court rejected petitioners' claim of a taking because the plaintiffs had failed to meet their burden of proving a final deprivation of the use of their property. A. 29-31. As for plaintiffs' claim of discriminatory treatment, the supreme court found that this claim was "only peripherally raised" before the Board and was "never corroborated...with evidence." A. 30. Because the record was insufficient, the court declined to review the claim. Id. Finally, in a footnote, the supreme court noted that its holding that the subdivision regulations were "reasonably precise...", thereby giving plaintiffs adequate notice, "disposed" of plaintiffs' argument that "they have been de-

prived of their due process rights..." A. 26.

SUMMARY OF ARGUMENT

To persuade the Court to grant certiorari, plaintiffs argue that the Connecticut Supreme Court's decision: 1) conflicts with that of the appellate court Pet. 12-14, 2) departs from the "accepted and usual course of proceedings" Pet. 14-21, and 3) is an inappropriate adjudication of what plaintiffs' strain to characterize as "federal questions." Pet. 22-28. The first two theories of plaintiffs' argument are not "special and important reasons" to review the decision of a state's highest court. Sup. Ct. R. 10.1(b)-(c). As to the third contention, plaintiffs have failed to raise any reviewable or substantial federal question. Plaintiffs'

claims of denial of due process and discriminatory treatment were neither properly raised nor addressed below and do not present substantial federal questions. Their takings claim is premature and must be dismissed for want of jurisdiction. Therefore, the Court lacks jurisdiction pursuant to 28 U.S.C. §1257 to grant a writ of certiorari to the Connecticut Supreme Court and the petition must be denied.

ARGUMENT

I.

THE "DUE PROCESS" CLAIM RAISES NO REVIEWABLE FEDERAL QUESTION

Plaintiffs' "due process" argument appears to be that the term "health and safety" in the Town's charter is an overly vague standard for the consideration of historic factors.

(Pet. i)[2] This contention was not properly presented to or addressed by the state courts and fails to raise a substantial federal question.

1. The Issue Was Neither Raised Nor Addressed In the State Courts

In reviewing the judgments of state courts under 28 U.S.C. §1257, the Court has consistently refused to decide issues that were neither raised nor addressed below. Yee v. City of Escondido, 112 S.Ct. 1522, 1531 (1992); Illinois v. Gates, 462 U.S. 213, 217-224 (1983).

---

[2]Plaintiffs misstate the record and the law in attempting to frame the issue. Their proposed subdivision did not "meet[] all written regulations" Pet. i; the proposal met zoning requirements but failed to comply with the subdivision regulations. Similarly, the proposed subdivision was not denied, as plaintiffs repeatedly assert, on the grounds that it was offensive to a vague notion of "public health and safety". The proposal was denied pursuant to regulations specifically calling for the consideration of historic factors and for the redesign of subdivision

Plaintiffs never made in the state courts the "due process" argument they now seek to assert. Neither the trial court nor the appellate court considered any alleged due process claim, presumably for want of proper presentation. Webb v. Webb, 451 U.S. 493, 495 (1981).

In the supreme court, plaintiffs for the first time complained that the subdivision regulations offended "due process"[3] under the theory that terms relating to historic considerations were vague. The supreme court responded in a footnote that plaintiffs' "due process" claim was "disposed of" by the supreme

---

[2](cont'd) plans to protect historic resources. Finally, the proposal was not denied "just because it is located within a residential Historic District" Pet. i, but rather because it would have a drastic impact on the Historic District.

[3]Exactly what "due process" requirement is offended was unclear. The only specific reference in the portion of

court's holding that the regulations were sufficiently precise and gave plaintiffs adequate notice. A. 26.

In light of the adverse holding by the supreme court, plaintiffs now attempt to conjure up a different "due process" claim that the state courts were never asked to consider. Under these circumstances, whether for lack of jurisdiction or because of prudential concerns, the plaintiffs' request that the Court hear the due process issue should be denied. Yee, 112 S. Ct. at 1531.

2. No Substantial Federal Question is Raised

More fundamentally, the Court should decline certiorari for lack of a

---

[3](cont'd) plaintiffs' brief to the Supreme Court devoted to "due process" is an allusion to Section 8-2 of the Connecticut General Statutes, which plaintiffs describe as imposing a "due process" requirement for special permits. Resp. A. 4-9.

substantial federal question.

A substantial federal question conferring jurisdiction on the Court is a real, substantive question on which a case may be made to turn. City of New Orleans v. New Orleans Waterworks Co., 142 U.S. 79, 87 (1902); Millinger v. Hartuper, 6 Wall 258 (1867) (something more than a "bare assertion" of a federal question is required).

Plaintiffs' invocation of constitutional "labels" and recitation of general holdings utterly fail to invoke a constitutional question of substance. The supreme court's construction of the Town's Charter is a matter of state law which does not involve -- and cannot be made to involve -- any issue arising out of the due process clause of the federal Constitution.

The charter is the enabling act which grants the Town authority to enact and enforce subdivision regulations. West Hartford Taxpayers Assn., Inc. v. Streeter, 190 Conn. 736, 742, 462 A.2d 379 (1983). Its provisions are interpreted according to general rules of statutory construction. Arminio v. Butler, 183 Conn. 211, 217, 440 A.2d 757 (1981).

The interpretation of state statutes is uniquely a matter of state law and the decisions of state courts are generally binding on the Court. Terminillo v. Chicago, 337 U.S. 1, 4 (1948) (construction of ordinance is a ruling on a state law question that "is as binding...as though the precise words had been written into the ordinance"). Indeed, "it takes more than a possible misconstruction" of a statute by a

state's highest court to make a due process claim under the Fourteenth Amendment. Seattle, Renton & Southern Railway Co. v. State of Washington, 231 U.S. 568, 570 (1913).

Applying state law, the supreme court interpreted the term "health and safety" in the charter provision relating to subdivisions to authorize the consideration of environmental factors, including historical factors. Also applying Connecticut law, the supreme court concluded that the terms "historical factors" and "historical streetscapes" used in the regulations and the Town plan of development had a reasonably precise meaning and apprised plaintiffs that historic factors would be considered. This construction of the

Town's charter and regulations is amply supported by the supreme court's prior interpretations of Connecticut statutes, and does not give rise to any federal question.[5] The supreme court's construction of state law is also binding on this Court.

II.

THE COURT SHOULD DECLINE TO REVIEW PLAINTIFFS' EQUAL PROTECTION CLAIM

The plaintiffs also assert under the rubric of an "equal protection" claim or a claimed deprivation of their civil rights that the subdivision regula-

---

[5] Even if a federal question were raised, no special or important reasons exist for granting a writ of certiorari. Plaintiffs do not cite any decision by the Court, a federal court of appeals or the highest court of any state that is contrary to the precise issue considered by the supreme court. Respondent is unaware of any such authority. The only other highest state court to consider a comparable issue reached the same result. Victorian Realty Group

tions were unequally applied to them and throughout the Historic District. Pet. i Like the "due process" claim, this argument is wholly insubstantial, consisting of nothing more than a recitation of constitutional and statutory provisions and general holdings. Moreover, it is wholly lacking in record foundation.

The "discrimination" claim was not mentioned before the Board and the record is virtually devoid of any evidence submitted to the Board sufficient to examine such a claim. Neither the trial court nor the appellate court addressed the issue.

---

[5](cont'd) v. City of Nashua, 130 N.H. 60, 534 A.2d 381 (1987) (subdivision regulation requiring consideration of "health and welfare" authorized planning board to consider historic factors)

In light of this history, the supreme court stated that the claim of discriminatory treatment was "only peripherally raised" before the Board and "never corroborated ... with evidence." A. 30. The supreme court declined to review the claim for wont of a sufficient record. Id. For the same reason, and because no substantial federal question is raised, the Court should also decline to review the issue. Yee, 112 S. Ct. at 1531.

III.

PLAINTIFFS' "TAKINGS" CLAIM IS NOT RIPE; IN ANY EVENT, NO TAKING HAS OCCURRED

The Connecticut Supreme Court found no merit to plaintiffs' takings claim because the plaintiffs had not met their burden under Connecticut law of proving that they had been finally deprived of the reasonable and proper

use of their property. A. 29-31. See Gil v. Inland Wetlands and Watercourses Agency, 219 Conn. 404, 415, 593 A.2d 1368 (1991); Luf v. Southbury, 188 Conn. 336, 351-52, 449 A.2d 1001 (1982). The supreme court's conclusion is fully consistent with the Court's decisions requiring a final decision regarding property development before a takings claim is ripe for review. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986); Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 186-194 (1985); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-137 (1978).

Plaintiffs have been denied a particular subdivision application. As the Connecticut Supreme Court recognized, this denial "does not lead to the conclusion that other plans will be denied as

well..." A. 30. Plaintiffs remain free to reconfigure their proposal to reduce its adverse impact on the Historic District, and were repeatedly encouraged to do so.

Indeed, the Board specifically found that plaintiffs have other viable alternatives to develop their property. A. 92. This factual finding was not disturbed by any of the reviewing courts.[6] Under these circumstances, the Board's denial of approval "does not conclusively determine whether [plaintiffs] will be denied all reasonable

---

[6]Plaintiffs' only challenge to this finding is an allusion to testimony of the Board's chairman, who suggested that an alternative option did not merit discussion because of his speculation that the Historic District's Commission would not approve it. As pointed out by the Connecticut Supreme Court, this testimony "does not establish that the Board believe[d] that there are no viable alternatives." A. 30.

beneficial use of their property and therefore is not a final reviewable decision." Williamson, 473 U.S. at 194.

In fact, plaintiffs' true complaint is not that their property has been confiscated, but rather that the alternatives for subdivision are not to their liking.[7] This, however, is not tantamount to a deprivation of "all economically beneficial use" of their property. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1991); Gil v. Inland Wetland & Watercourses Agency, 219 Conn. 404, 415, 593 A.2d 1363 (1991).

Plaintiffs' assertion that they have been deprived of the entire value

---

[7]As they point out, "[f]irst and foremost, why should [they] be forced to consider alternatives (which are unacceptable to them as well as to their neighbors)...?" (Pet. 25)

of a "free-throw lot" is disingenuous. Assuming for the purposes of argument that they are entitled to take a "free-throw" lot in the manner they describe, the denial of their subdivision proposal has no impact on their ability to do so subject to whatever regulatory limitations are imposed because the property lies within the Historic District.[8] They simply have not been denied all economically beneficial use of all or any portion of their property. Therefore, no taking has occurred.

---

[8] Plaintiffs represent that their property has not been divided since 1911 and that they may take a free-throw lot by presenting their deed to the Town. These "facts" are not in the record.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of the other respondents in opposition to the petition for certiorari, the respondent Zoning Board of Appeals of the Town of Greenwich[9] respectfully requests that the petition for certiorari be denied.

ZONING BOARD OF APPEALS OF
THE TOWN OF GREENWICH

JOHN E. MEERBERGEN
Town Attorney

JOYCE H. YOUNG
Assistant Town Attorney
Counsel of Record

Law Department
Town Hall, P. O. Box 2540
Greenwich, CT 06836-2540
622-7878

---

[9] As previously stated, the full title of the Board is the Planning and Zoning Board of Appeals of the Town of Greenwich. However, since both the caption of the decision of Connecticut Supreme Court and the petition refer to the Zoning Board of Appeals of the Town of Greenwich, the Board has adopted that reference throughout this brief to avoid confusion.

No. 93-1092

In The

Supreme Court Of The United States

October Term, 1993

E. DON SMITH and EILEEN SMITH,
Petitioners,

v.

ZONING BOARD OF APPEALS
OF THE TOWN OF GREENWICH, THE HISTORICAL
SOCIETY OF THE TOWN OF GREENWICH, INC.,
and ANITA DE LESSUPS KEEFE,
Respondents.

On Petition for Writ of Certiorari
To The Connecticut Supreme Court

APPENDIX

INDEX TO APPENDIX

	Page
Sec. 6-266(a)(19) of the Town of Greenwich Municipal Code	A-1
Sec. 6-296(d) of the Town of Greenwich Municipal Code	A-3
Pages 9-11 of Plaintiff's Brief to Connecticut Supreme Court	A-4

APPENDIX

Sec. 6-266. Preliminary layout contents

...

(19) For a subdivision of ten (10) lots or more or the subdivision of ten (10) or more acres, an environmental assessment by qualified environment specialists shall be provided. The Commission may require said assessment for smaller subdivisions if deemed necessary. The assessment shall include an evaluation of the following: (3/9/81)

(a) Conformance with the Open Space Plan of Development

(b) Significant wetlands

(c) Steep Slopes

(d) Stormwater Drainage

(e) Soils capabilities

(f) Vegetation including forested areas and the identification

of trees over 10" in caliper when not part of forested areas

(g) Significant geological formations

(h) Historical and archaelogical [sic] factors

(i) Animal habitats

(j) Water availability and quality

(k) Aquifer protection in accordance with the Statutes of the State of Connecticut

(l) Other data which the Commission deems appropriate

The environmental assessment shall be subject to a review, after the receipt of recommendations of the Conservation Commission, by the Planning and Zoning Commission including the mitigation measures for minimizing environmental impact before the applicant proceeds to final plan.

...

Sec. 6-296. Natural features; preservation.

(d) Where an Environmental Assessment indicates the need for a redesign or larger lots in order to protect environmental or historic resources, the Commission may require such revisions. (3/9/81)

[Pages 9 - 11 of Plaintiffs' Brief
to the Connecticut Supreme Court]

DUE PROCESS:
THERE IS NO "NOTICE" IN TOWN DOCUMENTS

There is no way that the Appellees could have been forewarned that they would be unable to subdivide and build within an Historic District. Prohibition of subdivision and consequent house construction, according to code, is not prohibited in any of the State or town documents, including Appellee's deed.

The C.G.S. $ 8-2 has a due process requirement, stating that (special permits) must be issued in accordance with standards set forth in the regulations.

"The terms "town plan of development", "historic factors", and "historic streetscape" are not known and fixed standards required for subdivision regulations." (28 App.29)

"The test of a permissible sub-

division regulation is whether criterior [sic] contained in the regulation are as reasonably precise as subject matter requires and are reasonably adequate and sufficient to guide city planning commission and to enable those affected to know their rights and obligations." American Power & Light Co. v Securities & Exchange Comm. 329 U.S. 90, 105, 67 S. Ct. 133, 91 L.Ed 103 Ours Properties, Inc. v. Ley, 198 Va. 848, 851, 96 S.E. 2d. 754; 1 Am. Jur. 2d, Administrative Law, $118.

It is well established that subdivision regulations, in order to be legally valid, must: 1) set forth "known and fixed standards;" and, 2) conform to the principle "that a regulation ... cannot be too general in its terms." Sonn v Planning Comm. of Bristol, 172 Conn 156. Aunt Hack Ridge Estates, Inc. v

Planning Comm. 160 Conn. 109.

"A 'general objective' ... could not serve as the basis for denying the plaintiff's site plan application but could only have served as a reason for requiring modification." T.L.C. Development v. P&Z Comm. Town of Branford 215 Conn. 527 (1990).

The Supreme Court sustained the Trial Court's conclusion that this reason (poor use of site) was "vague, uncertain in meaning and provided no real quidance [sic] to the plaintiff as to the manner in which the plan failed to comply with the requirements of the regulations." Kosinsky v. E. Lawlor, 177 Conn. 420.

"Zoning regulations merely stating broad legislative purpose did not provide any standard for approval or denial of site plans and could be used by

members of planning section of P & Z Commission only in conjunction with, and not as an alternative to, standards as contained in applicable zoning regs; thus, members of planning section exceeded their authority in denying approval of a site plan on ground that plan presented a poor use of the site." Kosinski v Lawlor 177 Conn 420.

The broad concepts "town plan, historic factors, and historic streetscape: do not meet the above quoted test for the validity of a regulation because they are too vague.

THEREFORE, THE ZBA ACTED ILLEGALLY, ARBITRARILY AND IN ABUSE OF ITS DISCRETION WHEN IT DENIED THE SUBDIVISION.

Tondro, in his 1992 Connecticut Land Use states on page 113: "Most of the cases that have rejected municipal efforts to regulate for aesthetic

reasons have done so because the town did not articulate sufficient criteria in its regulations to satisfy the court that fair notice of what was required had been provided."

"Even though zoning regulations could impose aesthetic controls, they had to use words less vague than 'unsightly' to do so." Town of Newtown v. Plunske, Conn L. Tribune 9/30/85 page 10.

Tondro, describes a comparable case to Appellees' (Tondra, supra p. 190) "This case involved the power to certify compliance with a regional water plan, the Supreme Court holding that the defendant could neither decide nor refuse to decide until it had prepared a plan --- the functional equivalent of the standards in a regulation governing the

granting of a special permit, subdivision approval, or site plan approval."

The case referred to is Monroe v. Middlebury Conservation Comm'n, 187 Conn. 476, 484, 447 A.2d 1, 5 (1982) (citations omitted):

> To hold otherwise, to permit an administrative agency to develop an ad hoc plan as a yardstick against which to measure any given proposal, is to substitute whimsy for sound judgment.... Giving an administrative agency such absolute power could deprive a land-owner of his property, without due process of law.... Although due process is not intended to hold administrative agencies under a short leash, it is designed to restrain them from roaming at will over the adjudicative landscape.

Clearly a planning and zoning commission cannot take into account the fact that the property is located in an Historic District if they have not written specific regulations to guide themselves and those citizens affected.

TO DO SO WOULD BE TO EXCEED THEIR AUTHORITY

Supreme Court, U.S.
FILED
FEB 17 1994
FEB 1994
OFFICE OF THE CLERK

(5)

No. 93-1092

In The

SUPREME COURT OF THE UNITED STATES

October term, 1993

E.DON SMITH pro se, EILEEN SMITH pro se
Petitioners

v.

ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH and THE HISTORICAL SOCIETY OF THE TOWN OF GREENWICH, and ANITA DE LESSUPS KEEFE.
Respondents

On Petition for Writ of Certiorari
To The Connecticut Supreme Court

PETITIONERS' REPLY BRIEF TO OPPOSITION

E. Don Smith & Eileen Smith, pro ses
35 Strickland Rd. Cos Cob,
Connecticut, 06807
(203) 661-2883

---

28 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTRODUCTION.....1

History of Counselors.....1

Description of Historic Dist...2

I. CORRECTION OF MISSTATEMENT OF FACTS

A. DISCUSSION OF DUE PROCESS.....6

B. DISCUSSION OF DISCRIMINATION..12

C. DISCUSSION OF TAKING.....14

II.SUMMARY OF ARGUMENT
and OF JURISDICTION...18

CONCLUSION..... 20

APPENDIX

A ZBA REGARDING DUE PROCESS.....A 1

B ZBA REGARDING DISCRIMINATION .A 3

C LIST OF PREDISPOSED
STATEMENTS FROM THE
TRANSCRIPT OF THE ZBA
HEARINGS.....A 5

TABLE OF AUTHORITIES

CASES page

Brecciaroli v EPA 168 Conn349..... 17

Lucas v. S. Carolina Coastal Council 112 S.Ct. 2886 (1992)..... 15

Missouri P.R. Co. v Mackey (1988).. 14 127 US 205

Mugler v Kansas 123 U.S. 623 at.... 7 661 (1887)

Re Groban 352 US 330 (1957)..... 19

Smith v. Googuen (1974) 415 US 566.. 11

Smith v Zoning Board of Appeals 28 Conn. App. 29 (1992).....11,13

Smith v. Zoning Board of Appeals 227 Conn.71 (1993).....3

U.S. v Burnison 339 US 87 (1950)...19

U.S. v Harriss 347 US 612 (1954)...21

Victorian Realty Group v City of Nashua 534 A.2d 381 (1987)..... 17

FEDERAL STATUTES:

U.S. Constitution 5th and 14th Amendments.....20

Civil Rights Act of 1871 (42 USCS .Sec 1983)..... 20

28 USCA $1257(a)..... 20

BOOKS

Kauper, P. & Beytagh, Franc: Constitutional Law, Boston: Little, Brown and Co. 1980..... 19

INTRODUCTION - HISTORY OF COUNSELORS

The petitioners E.Don and Eileen Smith pro ses, between 1987 and 1994 have dealt with opposition from five different counselors from the Town of Greenwich, and The Historical Society. The two most junior ones are Ms Joyce Young who began with Connecticut Supreme Court, and Mr John Yavis, who started with his current opposition document.

Since the Smiths have represented themselves, through the Planning and Zoning process, (then used Counsel for the Zoning Board of Appeals), then defended themselves (without legal counsel) through The Superior Court, The Appellate Court, and the Conn Supreme Court, they are familiar with the briefs, the Court decisions and all the Court Transcripts.

Many accusations were made by both counselors which **are in opposition to**

"the facts" stated within the **Overall Record.** The following clarifications are submitted to the Court.

INTRO - DESCRIPTION OF HISTORIC DISTRICT

In contrast to Town of Greenwich' description of the Historic District, it is 23 houses, all tiny except 3. The zone is 7,500 s.f. per lot; 13 lots are nonconforming, averaging 5,000 to 6,000. All houses are only 25 ft or less, from the street except 3. Only 6 are historic, the rest were built between 1930 and 1987. The most recent was constructed by the Historical Society. Most of the houses have no architectural features and over 1/2 were contractual speculative homes.

The only sweeping lawns are the petitioners and one neighbor. The petitioners' property is 33,000 s.f. which could easily accommodate a home with a 1200 s.f. footprint in the corner

of the front, and still display a sweeping appearance.

I. CORRECTION OF MISSTATEMENT OF FACTS

A. DISCUSSION OF DUE PROCESS

Respondent claim : 1. Plaintiffs never protested the vagueness of the terms "**health and safety** " until the U.S. Supreme Court.

Petitioner correction: 1. This is an illogical argument. These terms were mentioned for the very first time by the Connecticut Supreme Court: "...the charter provision giving the commission the power to protect 'public health and safety' includes the power to protect the environment, which in turn includes historic preservation." Smith v. Zoning Bd. of Appeals 227 Conn. 71 (1993). The Supreme court decided to utilize these vague new terms which had never been used throughout two levels of zoning hearings and two levels of state courts. Because the Appellate Court had struck down the use of the TOWN PLAN of DEVELOPMENT as the root of historic

factors, the Supreme Court had to search for something to support them. They created a double extrapolation of artificial interpretations.

The Supreme Court's decision is in error. The assurance of "public health and safety" would already be guaranteed by the compliance with all subdivision and zoning regulations anyway.

The U.S. Supreme Court must intervene to enforce the 14th amendment and protect substantive due process rights.

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty-- indeed, are under a solemn duty--to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, **a statute purporting to have been enacted to protect the public health,** the public morals, or the public **safety, has no real or substantial relation to those objects,** or is a palpable **invasion of rights** secured by the fundamental law, **it is the duty of the courts** to so adjudge, and thereby **give effect to the Constitution.**" (emphasis added). Mugler

v. Kansas, 123 U.S. 623 at 661 (1887).

Respondent Claim: 2. The Historic Society's counsel claims the Town Plan of Development is a regulatory instrument endorcing historical factors and historical streetscapes as regulations.

Petitioners Correction: 2. Both the Appellate and Supreme Courts concur that Section 98 of the Greenwich Town Charter prohibits use of the Town Plan of Development to obstruct a subdivision.

Respondent claim : 3. Plaintiffs did not brief or argue claims of due process within ZBA and within the first two state courts.

Petitioner correction: 3. This is in error. A review of all three of plaintiffs' briefs will demonstrate how thoroughly these issues were presented for review. Counsels should also refer to all four transcripts.

ZBA - DUE PROCESS

At the ZBA hearing, Plaintiffs' attorney raised the following Due Process issues: **1.** Requested a fair hearing. **2.** Noted that plaintiffs did not have notice that they could not subdivide in an Historic District. **3.** Exposed subdivision regulations as impossibly vague and ambiguous re Historic Factors **4.** Demanded that Plaintiffs' Constitutional property rights be honored. **5.** Stated that to deny this legal subdivision would be confiscatory.

At the same ZBA hearing, the chairman and a board member, both admitted that there was **nothing in the regulations** that discusses the **impact of an historic district on sub divisions.** See Appendix A for exact quotations.

SUPERIOR CT ORAL ARGUMENTS - DUE PROCESS

Page 14: PLAINTIFF: "They (ZBA) acted beyond their discretion in denying our subdivision. They had no valid reasons, had improper motives and were dishonest".

(Plaintiff read the following into the record:) From the ZBA April 89 transcript on page 103 from Mr. Emmanuel, one of the Appeal Board Members: "My problem is I don't see anything in the subdivision regulation that says that the Commission shall turn down or may turn down a subdivision application because **even though it complies with all the requirements they just don't like it.**

In his last quote from Mr Emmanuel on page 104: "**What authority does the Commission have to turn these people down? They have complied** with all the zoning regulations and everything the staff said they should do."

The above quotes substantiate that Plaintiffs **did raise** the issue of the **lack of due process.**

Respondents Claim: 4. The Superior and Appellate Court decisions did not address due process.

Petitioners correction 4.

Respondent Young has failed to see that the **Superior Court** and the

Supreme Court both made the following conclusion: The regulations are specific and the plaintiffs had notice.

Respondent Young accepts the Supreme Court's label that this is a due process analysis, but since the Superior court failed to label it "due process" the respondent was blind to it.

The **Appellate Court** recognized that the Plaintiffs' due process had been denied and reversed the Superior Court decision stating: "...**the statutes setting forth substantive and procedural subdivision requirements do not authorize the inclusion of historical factors, the reasons given by the board for the denial were not based on known and fixed standards...**" Smith v Zoning Bd. of Appeals 28 Conn. App. 29 (1992).

"There is denial of Due Process where inherently vague statutory language permits selective law enforcement." Smith v. Goguen (1974) 415 U.S. 566.

This petition for certiorari is valid because due process has been addressed within the state courts.

B. DISCUSSION OF DISCRIMINATION

Respondents claim: 1. The claim of discrimination was not mentioned before the board and there is no evidence.

Petitioners correction: 1.

This is an uninformed assertion. Discrimination charges have been raised at every level since the ZBA hearing and one has only to read the transcripts to find sufficient evidence.

ZBA HEARING LEVEL - DISCRIMINATION

Both the ZBA chairman and at least one ZBA member opened the meeting with blatant statements of predisposition. The Chairman stated that he had a letter from the Chairman of the Historic District stating that no house would be acceptable on the front property. The ZBA Chairman further stated that this " de nova" hearing would be a waste of time. (See Appendix B, for quotes.)

During the hearing, the Chairman of

the Historic District Commission testified that they had had a meeting and voted (without a submission for Certificate of Appropriateness) that no house would be acceptable on the front lot. (See Appendix B, for quotes).

SUPERIOR COURT LEVEL - DISCRIMINATION
ORAL ARGUMENT TRANSCRIPT

1. PREDISPOSITION

Within the Oral argument of the Superior Court, the Plaintiffs submitted a list of the page and line number of more than 30 predisposed comments by both the ZBA members, ZBA Chairman, and the Chairman of the Historic District Commission. The list was accepted the court without objection. See Appendix C.

Page 28, PLAINTIFF: "...the Planning Zoning Appeals Board was predisposed with their decision and did not perform judicial responsibilities as a body without prejudice."

2. UNEQUAL TREATMENT

Page 25, PLAINTIFF: Therefore, our

property interest entitles us to sue for the deprivation of our right to subdivide. We are entitled to equal protection under the law. **Under the same historic district and subdivision regulations, the Historic Society was treated differently than we were since they were allowed to build."**

Page 53, PLAINTIFF: "Relative to the construction by the Historic Society, everybody always says, well, you can't see it from the street. I have three photographs of the structure here that you were asking about. It's almost 2,900 square feet, and I have two pictures that view it from the street. If you'd like for me to submit it to the court."

These Photographs of the new structure erected by the Historic Society within the Historic District were accepted into the Record as noted on Page 54 of the Transcript as **evidence of unequal treatment** under the law.

Respondents Claim: 2. Neither the trial court nor the appellate court addressed discrimination.

Petitioners Corrections: 2. The fact that both of these **courts were**

well aware of the discrimination issue is revealed in the oral argument transcripts.

SUPERIOR COURT ORAL ARGUMENT TRANSCRIPT

Page 57. SUPERIOR COURT JUDGE: "...he (Plaintiff) seems to question the trustworthiness of the public officials to give him a fair hearing without a predisposition, which is of course one of the standards."

Page 56. SUPERIOR COURT JUDGE: "The second (ultimate issue for me) is whether the Board was predetermined."

Page 54. SUPERIOR COURT JUDGE: "You don't object? They (photographs of the Historic Society new structure)may be submitted to the clerk, then."

The above quotes reveal that the Trial Court was very aware of the claim of discrimination. However, the **Trial Court erred by not evaluating and not deciding** the Plaintiffs' case of **discrimination.** Plaintiffs were not satisfied that their complaints were fairly heard in the trial court, so they appealed to the next higher court.

APPELLATE COURT IDENTIFICATION OF LOWER COURT DISCRIMINATION

It is apparent from the following quote from the Memorandum of Decision that the Court believed that there was discrimination:

"At oral argument, the board's counsel conceded that if the subject property was not located in an historic district, but in another R-7 zone, the application would have been approved because it met all the regulations not concerned with "historic." Smith v. Zoning Bd. of Appeals 29 Conn. App. 28.

The Appellate Court agreed that there was discrimination because they overturned the ZBA and the Trial court's decision.

Respondents Claim: 3. Supreme Court declined to review discrimination for wont of a sufficient record.

Petitioners Correction: 3. The Supreme Court **claims** that plaintiffs only peripherally raised this claim before the board and never corroborated it with evidence.

Apparently, the **judges failed to review** all three of the plaintiffs' briefs and the transcripts of ZBA and of all three courts for repeated claims of discrimination, as well as the photographs of the new building just two doors down.

"Due process is secured if laws operate on all alike, and do not subject individuals to arbitrary exercise of powers of government." Missouri P.R. Co. v Mackey (1988) 127 U.S. 205.

C. DISCUSSION RE TAKING

Respondent claim: 1. "Its not ripe"

Petitioner correction: 1. There is no justification for requesting the Plaintiff to submit alternatives when their **plan is within compliance** of all known statutes and regulations.

The Appellate court, by approving the existing subdivision plan, determined that subdivision alternatives were not required.

The Connecticut Bar Association,

within their Amicus Curiae Brief further upheld the legality of this subdivision proposal, which eliminated the need for alternatives.

The U.S. Supreme Court has supported other taking claims without insisting on executing alternatives (ie, free throws, new plans, special permits, changing zoning codes, etc.)

From the landmark takings case, Lucas v S. Carolina Coastal Council 112 S.Ct. 2886 (1992): "Lucas' takings **claim is not rendered unripe** by the fact that he may yet be able to secure a special permit to build on his property..."

Respondent claim : 2. "Plaintiff has not been deprived of a free-throw lot by denial of the subdivision proposal.

Petitioner correction: 2. The issue at hand is a subdivision into 3 properties which is in full compliance with the zoning code and the subdivision regulations.

It is physically impossible to create three properties while excluding the use of the front half of the property. That front portion constitutes a legal building lot referred to as a "free-throw lot" which was confirmed by the P&Z Director. (See Record p.14). **To prevent 100% use of that legal lot is a taking;** and to prevent this legal triple subdivision is the **taking of two building lots** without just compensation.

Respondent claim : 3 Plaintiffs have alternatives.

Petitioner correction: 3. Plaintiffs **have no other alternative within the existing zoning code.** The ZBA Hearing Transcript quotes the **ZBA Chairman refusing to approve development in the back** of the property (Part I pg.58) and the **Chairman of the Historic District Commission refusing to approve any house on the front lot** (Part II pg. 86)

Where does the respondent think the alternatives can be?

"If the commissioner made it clear by repeated rejections of applications, that he would never approve an application, there would be a **taking**." Brecciaroli v EPA 168 Conn 349.

Respondent claim : 4. There was no claim to a diminution in value of the taking.

Petitioner correction: 4. This is an error. Within all three briefs submitted to all three state court levels, there was a detailed analysis of financial loss of the 100% confiscation of the front building lot:

Plaintiffs' Briefs: Superior Ct. p.5,6 Appellate Ct. p.23, Supreme Ct. p.25.

Respondents claim: 5. Victorian Realty Group v City of Nashua, 534 A.2d 381 (1987) is a case which decided a comparable issue.

Petitioners' Correction: 5. It is crucial to point out that Victorian Realty Group was looking for a zone

change to commercial and multi-family use, and wanted to cut a new street down the middle of the property.

In contrast, plaintiffs only want to use their property just like their neighbors, to build a small house on a small lot, within all existing regulations.

II. SUMMARY and JURISDICTION

If the Connecticut Supreme Court is allowed to obstruct the construction of a house on a piece of land by simply saying that it would be a hazard to the public health and safety, then clearly, citizens' property rights are being taken away.

"Constitutional requirement of definiteness is violated by...enactment that fails to give person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." U.S. v Harriss (1954) 347 U.S. 612.

Concurrently, the Court has looked

the other way while the same rules were applied differently to Plaintiffs' neighbor who was allowed to build.

"It is only when variations (of state's treatment of persons) are arbitrary and without reasonable legal basis that unconstitutional discrimination occurs." U.S. v Burnison 339 U.S. 87 (1950)

The Town Attorney said, "Interpretation of state statutes is uniquely a matter of state law." Plaintiffs response is that the U.S. Supreme Court needs to be involved.

"The test to measure the validity of a state statute under the due process clause of the 14th Amendment is whether statute is contrary to fundamental principles of liberty and justice." Re Groban (1957) 352 US 330.

Clearly, this is a Type I Due Process case of constitutional law: "The state court has unjustly discriminated against (the plaintiff as) an individual, and against (the Historic District residents as) a group." Kauper, Paul and Beytagh, Francis, Constitutional Law. Little Brown & Co: Boston, 1980.

The U.S. Supreme court exists to

help correct error in the lower courts

per 28 USCA $1257(a) "...where the validity of a state statue of any state is drawn into question on the grounds of its being repugnant to the Constitution..."

The U.S. Supreme Court should intervene to protect the rights of the 5th and 14th Amendments of the Constitutional and of the Civil Rights Act of 1871 (42 USCS Sec 1983).

CONCLUSION

For all the foregoing reasons, E.Don and Eileen Smith, the petitioners, respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

E. Don Smith Eileen Smith

E. Don Smith, Eileen Smith, pro ses
35 Strickland Rd
Cos Cob, Conn. 06807
(203) 661-2883

APPENDIX A

ZBA HEARING TRANSCRIPT RE DUE PROCESS

Issues re due process were clearly addressed as evidenced by the following extracts within the ZONING BOARD OF APPEALS HEARING TRANSCRIPT.

RE DUE PROCESS - FAIR TRIAL

Plaintiffs' Attorney:

PART I p.26 line 19 "But of all the equities and rules of fairness and the citizens' rights, the rights of one little private citizen...we're talking about law; **this is fairness and justice**...needs to be felt by you as a commission in your deliberations on this matter.

RE DUE PROCESS - SPECIFIC STANDARDS

PLAINTIFFS'ATTORNEY

PART I p. 24 line 14 "But nothing in our state statutes or our state law providing for historic districts prevents a man from subdividing his property. There isn't anything in the historic district statute of the state of Connecticut or in the ordinance of Greenwich that says you can't subdivide the property."

PART I p.61 line 24 "...when they created the idea of a historic district, they didn't say you can't do anything with your property."

Part II p. 113 line 22 "...the commission's (P & Z) decision was improper as it premised its decision on

an impossibly vague and ambiguous subdivision regulation."

ZBA CHAIRMAN

PART II page 113 line 8, "...but as far as subdivisions go, I'm not aware of any regulations in a historic district."

ZBA BOARD MEMBER

PART II page 94 line 20 "But there's nothing in the regulations that discusses the impact of a historic district on subdivisions."

RE DUE PROCESS-CONSTITUTIONAL RIGHTS

PLAINTIFFS' ATTORNEY:

PART I page 65 line 5 "...I mean the valuable constitutional and ownership rights of Mr. and Mrs. Smith..."

PART I page 68 line 12 "I said to balance his (Plaintiff's) constitutional rights as an American citizen and a citizen in the town of Greenwich as against the masses."

PART I page 63 line 8 "...They (Historic District Commission) didn't mean to take property rights away from people when they would comply with the shape, the size and all the other requirements..."

PART I page 41 line 24 "...they (historical statutes) never intended that you couldn't make use of the property at all. That would be **confiscatory.**"

APPENDIX B

ZBA HEARING TRANSCRIPT
EXCERPTS ON DISCRIMINATION

PLAINTIFFS'ATTORNEY ASKED FOR A FAIR TRIAL:

PART I p.9 line 17 "...my job here tonight, is to make your board, as a judicial body, cognizant of the fairness and of the equity of this matter or the **lack of fairness and equity.**"

The following discriminatory statements are quoted directly from the ZBA transcript.

Opening statement by the Chairman of the ZBA Hearing, Transcript, Part I, page 5, line 22 quote:

[CHAIRMAN LYNCH: Before you start, Mr. Peden (Plaintiffs' attorney) I'd like to ask you a question. Do you have to get a certificate of appropriateness from the Historic District Commission?

MR PEDEN: To build a house?

CHAIRMAN LYNCH: Yes.

MR PEDEN: Yes.

CHAIRMAN LYNCH: So you'll need their approval?

MR PEDEN: Absolutely.

CHAIRMAN LYNCH: As you know, because I have a letter from the Chairman, Marcia Coyle, of the Historic District Commission in which she represents that the district opposes this application, that they did this before the Planning and Zoning Commission and they oppose it tonight.

So my question is to you, sir, **what**

is the point of our going through all of this we have to do to hear it and decide this case if we know that the district is not going to issue a certificate of appropriateness?"

This negative opening remark by the Chairman, sets the stage, to his board members of his predisposed feelings on this Hearing.

CHAIRMAN OF THE HISTORIC DISTRICT COMMISSION SPEAKING TO THE ZONING BOARD OF APPEALS:

PART II p.86, line 14: "It would be difficult for us to approve a house on lot number one when our position is that we don't want them to build on lot number one. It would be difficult to approve any house on the site plan when, in actuality, we don't want a house there."

ZBA MEMBER: MR. RADER: "We understand that."

ZBA CHAIRMAN LYNCH: This is one of the things that is bothersome. If the Historic District Commission was not going to approve any house, what was the point of ending up here?"

ZBA MEMBER MR. RADER: "In other words, if the applicant had known in the beginning that you were not going to approve anything on lot number one, the front of the property, that would have been the end of the story, right?"

ZBA CHAIRMAN LYNCH: "I suppose...we could take the position tonight that as long as they are not going to approve any building that the question is moot for our decision." ...

PLAINTIFFS' ATTORNEY PEDEN: "I take respectful exception to that Mr. Chairman."

ZBA MEMBER MR RADER: "It would be a very neat package if we could do that and we could fold up the papers and go home."

Once more, we now have a predisposed attitude by both the ZBA Chairman and one other ZBA member.

APPENDIX C

LIST OF PREDISPOSED STATEMENTS FROM THE TRANSCRIPT OF THE ZBA HEARINGS

THE FOLLOWING PAGES AND COMMENT NUMBERS INDICATE REMARKS THAT HAVE BEEN MADE WITHIN THE HEARING THAT WOULD QUESTION THE PREDISPOSITION OF MEMBERS OF THE BOARD AND HISTORIC DISTRICT COMMISSION AND CHAIRMAN.

PART 1

PAGE	LINES
6	14-17
58	17-25
59	2-8
59	21-24
60	3-5
65	19-20
67	10-25
68	3-6
70	16-18
81	13-22
80	10-14
82	5-12

PART 2

PAGE	LINES
35	8-25
36	16-25
37	3-4, 18-25
38	3-25
39	3-25
44	6-25
64	5-14
68	16-22
77	22-25
78	3-25
83	19-25
84	3-6
85	3-25
86	3, 14-18, 20-25 87 3-8
91	4-13
94	14-25
123	2-3